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No. 13312

In the
United States
Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON, *Appellant,*
v.
UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE EASTERN DIS-
TRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

STATEMENT OF THE PLEADINGS AND FACTS
DISCLOSING JURISDICTION

The Petitions for Condemnation (Tr. 3, 26), the letters of the Secretary of War (Tr. 10, 33), and the Declarations of Taking (Tr. 12, 37) show the nature of this action to be one for the condemnation of real property. The property described therein is situated within the Eastern District of Washington, Southern Division. Under the statutes pertaining thereto this action is properly brought in the United States District Court for the Eastern District of Washington, Southern Division.

The action was commenced by the United States of America on July 21, 1943. Under 40 U.S.C.A. 257 (36 Stat. 1167) jurisdiction was specifically granted to the United States District Court to hear such action. (This Act was amended in 1948, and the jurisdictional provisions are now found in 28 U.S.C.A. 1358 and 1403 (62 Stat. 935, 937).)

This action was in accordance with the provisions contained in the Act of Congress approved August 18, 1890 (26 Stat. 316) as amended by the Acts of Congress approved July 2, 1917 (40 Stat. 241), April 11, 1918 (40 Stat. 518; 50 U.S.C. sec. 171), and March 27, 1942 (Public Law 507—77th Congress), which Acts authorize the acquisition of land for military purposes, and the Act of Congress approved July 2, 1942 (Public Law 649—77th Congress), which Act appropriated funds for such purposes, and the Act of Congress approved February 26, 1931 (40 U.S.C.A. 258 a).

Provision is made in 28 U.S.C.A. 1241 and 1244 (62 Stat. 629, 930) for appeal from the judgment entered in the United States District Court for the Eastern District of Washington to the Court of Appeals for the Ninth Circuit.

STATEMENT OF THE CASE

Acting by and through its Attorney General and his assistants, on July 21, 1943, the United States of America, in the United States District Court for the Eastern District of Washington, Southern Division, filed a Petition for Condemnation and Declaration of Taking, for the acquisition of fee title to that part of Secondary State High-

way 11 A then being owned, operated and maintained by the State of Washington through its Highway Department. Such highway extended generally easterly and westerly through the area then being acquired by the United States for what has subsequently been designated as the Hanford Atomic Energy Project. (Tr. 1 through 18)

Order on Declaration of Taking granting to the United States immediate use and possession of said highway was entered and filed on July 23, 1943. (Tr. 21 through 27)

Thereafter on March 2, 1944, an amended petition for condemnation and Declaration of Taking No. 2 were filed by the United States in said cause (Tr. 27 through 41) wherein additional portions of the aforesaid Secondary State Highway 11 A were sought.

Order on Declaration of Taking No. 2 was entered by the District Court and filed in said cause on March 18, 1944. (Tr. 42 through 44)

United States authorities closed said secondary state highway to the public, thus preventing all public use thereof prior to or currently with the filing of the first declaration of taking (July 21, 1943), and said highway up to the time of trial had remained and still remains closed to public use. (Exh. 10, Appendix "C," Pages 51-53)

The section of the said secondary state highway taken from the State of Washington by the United States in this case was approximately twenty-eight miles in length. (Tr. 225)

Immediately upon the closure of said highway and the taking of the aforesaid twenty-eight mile closed por-

tion thereof, the officials of the Highway Department of the State of Washington commenced negotiations with various Government officials and the United States Attorney's office toward the end that the highway would be returned to the state after the close of the war. (Exh. 10, Tr. 279-280, Tr. 319)

These negotiations were carried on over a period of approximately three years when it was finally concluded that relocation of the highway would be required at least for state purposes. (Exh. 10, Tr. 279-280, Tr. 319)

Following such determination the state officials surveyed various routes for relocation of the highway. These routes were described as:

1. Through the firing range from Pomona, crossing the Columbia River at Beverly;

2. Route 2 across Wahluke Slope as shown on Defendant's Exhibit 3, Tr. 225, 280, 289, 310-312, 319-321;

3. Route 3 shown on Exhibit 3, which route was ultimately selected by the state as the relocation of that portion of the state highway taken in this action.

It was not until September 2, 1949, that the State officials were finally and definitely advised that the highway could not be relocated through the firing range or across Wahluke Slope. (Route No. 2, Exh. 3) (Tr. 225, Tr. 289, Exh. 10)

Route No. 3 (Exh. 3) was thereupon selected by the officials of the State Highway District as the necessary relocation for that portion of the State Highway taken. (Tr. 226, 227, Tr. 312, Tr. 320, 321)

The United States attorneys and the Attorney General's office of the State thereupon proceeded toward trial of this action upon the question of the compensation, if any, to be paid to the State of Washington for the taking of twenty-eight miles of its Secondary State Highway No. 11 A.

The delay in bringing the entire cause to trial was not the fault of either party, but was occasioned as a result of various negotiations; first toward the State retaining the highway; second, for the State in obtaining a permissible relocation. (See Exh. 10, Tr. 83; Tr. 280-281)

Immediately prior to trial in order to avoid all questions concerning the applicable dates of taking, that is, whether the filing date of the first declaration of taking July 21, 1943, the filing date of the second declaration March 2, 1944, or the date of denial of use of relocation—Route No. 2, Exhibit 3 (Sept. 2, 1949) would apply, a stipulation was entered into that the date of taking would be considered to be July 23, 1943, the costs of relocation assessed as of that date with interest to be allowed at six per cent per annum from such date on any recovery; (Tr. 62, Tr. 486-487) also to avoid all questions regarding increased costs of construction from July 21, 1943, to September 2, 1949. (Tr. 486, 487)

The cause proceeded to trial before a jury on May 17, 1951, and the trial was concluded May 28, 1951. (Tr. 61, Tr. 615)

The defendant, State of Washington, in such trial assumed the burden of proof. (Tr. 63)

At the close of defendant's evidence plaintiff moved for a directed verdict. (Tr. 407-414) The Court denied such motion (Tr. 414-415) (Appendix "A," Pages 45, 46) and plaintiff proceeded with its evidence.

At the conclusion of trial the plaintiff renewed its motion for a directed verdict (Tr. 591) (Appendix "A," Page 46), which the Court again denied. (Tr. 591)

The jury was thereupon instructed by the Court. (Tr. 593-610) Two forms of verdict were submitted to the jury, i. e.

Verdict Number 1, omitting the formal heading, reads:

"We the jury in the above entitled cause find that there was no reasonable necessity for the construction of a substitute highway, and find for the defendant in the nominal sum of one dollar."

Verdict Number 2 reads:

"We the jury in the above entitled cause find that there was reasonable necessity for the construction of a substitute highway for the portion of highway 11-A taken by the government, and find for the defendant in the sum of \$....."

The verdict of the jury was returned on form No. 2 in favor of the State in the sum of \$581,721.91. (Tr. 45, Tr. 614)

The plaintiff thereupon moved for judgment notwithstanding the verdict of the jury (denominated motion for new trial), (Tr. 45-46), which motion the Court granted setting aside the jury verdict and directing entry of judgment against the plaintiff in favor of the State in the nominal sum of one dollar. (Tr. 47-48). The oral

pronouncement of the Court in granting the motion for judgment notwithstanding the verdict is found at Tr. 615-619. (Appendix "B", Pages 47-50)

Final judgment was entered herein on February 7, 1952. (Tr. 49-53) The defendant State seasonably appealed on February 29, 1952, from the order of the lower court setting aside the verdict and directing entry of judgment and from the final judgment. (Tr. 54)

QUESTION INVOLVED

The jury having found that "* * * that there was reasonable necessity for the construction of a substitute highway for the portion of highway 11-A taken by the government * * *", and having assessed damages in favor of the state therefor in the sum of \$581,721.91 as relocation cost, should the Court have set aside such verdict of the jury?

The question resulted from the pleadings by the filing of the declaration, amended declaration of taking, orders on such declarations (Tr. 12-44) and payment by the government of the sum of one dollar (\$1.00) into the registry of the Clerk of the District Court as the estimated just compensation for the highway taken. To such payment the state objected and the cause proceeded to trial, the state contending it was entitled to the costs of relocating that portion of the highway taken, such costs being in the sum of \$1,117,556.58 (Tr. 206, Exh. 9) less \$50,000.00, the estimated costs of the ferry not taken. (Tr. 601-602)

At the conclusion of the State's evidence the Government made a motion for directed verdict, which motion

squarely presented the question in preliminary form to the Court. (Tr. 407-414) The Court denied the motion (Tr. 414-415) (Appendix "A", Pages 45, 46). The question was again so presented when the government renewed its motion, which the Court again denied at the close of the case. (Tr. 591) (Appendix "A," Page 46)

The question of reasonable necessity for relocation of that portion of the highway taken and the costs thereof were presented also by the instructions of the Court and the forms of verdict submitted. (Tr. 593-610)

The Government's motion for judgment notwithstanding the verdict (Tr. 45-46), which the Court granted (Tr. 615-619) (Appendix "B," Pages 47-50) for the last time in these proceedings, raised the problem.

ASSIGNMENTS OF ERROR

1. The jury having returned a verdict finding that there was a reasonable necessity for the construction of a substitute highway for the portion of State Highway No. 11-A taken, and assessing damages, being the cost of relocation, in the sum of \$581,721.91, the Court erred in setting aside that verdict.

2. There was substantial evidence introduced at the trial establishing the necessity for the replacement of that portion of State Highway 11-A taken, and the Court erred in holding that the verdict of the jury was not supported by such evidence.

3. The Court erred in entering the Order Setting Aside Verdict and Directing Entry of Judgment.

4. The Court erred in entering final judgment granting the government title to the portion of State Highway 11-A taken for the nominal sum of \$1.00.

5. The State offered evidence which would have further supported the verdict of the jury if admitted, and the Court erred in refusing to admit such evidence.

SUMMARY OF ARGUMENT

1. A ruling of the Court on a motion for judgment notwithstanding the verdict involves no discretion, but can be granted only when there is no evidence of reasonable inference from the evidence to sustain the verdict.

2. The measure of damage in the condemnation of a highway is the cost of the construction of a substitute highway along another route to the same standard and grade as the highway taken.

3. The evidence of the appellant established a necessity for the highway taken and that the proposed route was a reasonable substitute for it.

ARGUMENT

I. Setting Aside Verdict

The Court, in passing on a motion for directed verdict or to set aside a verdict, is not called upon to weigh the evidence, to exercise discretion or to pass upon the truth or falsity of the evidence. The one contesting the motion is entitled to the benefit of all inferences that may reasonably be drawn from the evidence in sustaining a verdict of the jury.

While there may be a question as to whether the rule is one of substantive law or procedures, and thus governed by Federal or State rule, we deem the distinction immaterial. The rule appears the same in both jurisdictions and the District Court recognized it in this case in passing on the motion for directed verdict. (Tr. 415, Appendix "A", Pages 45, 46 *Supra*) The rule is stated in *Myer v. Little Church by the Side of the Road*, 37 Wn. (2d) 897, 227 P. (2d) 165, at page 905 as follows:

"The rule which we have applied, and which should govern both the trial court and this court, is stated in the recent case of *Olsen v. White*, ante p. 62, 221 P. (2d) 542, as follows:

" 'A challenge to the sufficiency of the evidence, a motion for nonsuit, a motion for a directed verdict, or a motion for judgment notwithstanding the verdict admits the truth of the evidence of the party against whom the motion is made and all inferences that reasonably can be drawn therefrom, and requires that the evidence be interpreted most strongly against the moving party and in the light most favorable to the opposing party. *Billingsley v. Rovig-Temple Co.*, 16 Wn. (2d) 202, 133 P. (2d) 265, and cases therein cited. *Williams v. Hofer*, 30 Wn. (2d) 253, 191 P. (2d)

306. When confronted with such a situation it becomes the duty of the court to be guided by the above rule, rather than to consider all of the evidence presented during the trial.’ ”

also in *Wilcoxon v. Seattle*, 32 Wn. (2d) 734, 203 P. (2d) 658, at page 737 as follows:

“In considering the city’s assignment that the trial court erred in refusing to enter judgment in its favor notwithstanding the verdict, it is incumbent upon us to keep in mind the well established rule that, in passing upon a motion for judgment notwithstanding the verdict, we must not only accept as true all competent evidence in the record favorable to respondents, but must give them the benefit of every favorable inference which may be reasonably drawn from such evidence. *Vercruysse v. Cascade Laundry Co.*, 193 Wash. 184, 74 P. (2d) 920; *Keller v. Seattle*, 200 Wash. 573, 94 P. (2d) 184. A motion for a judgment notwithstanding the verdict involves no element of judicial discretion. *Wiggins v. North Coast Transp. Co.*, 2 Wn. (2d) 446, 98 P. (2d) 675.”

and in *Moore v. Keeseey*, 24 Wn. (2d) 139, 163 P. (2d) 164, at page 140 as follows:

“In order to have granted the motion it would have been necessary that the court be able to say there was neither evidence nor reasonable inference from the evidence from which the jury could have arrived at the verdict it rendered, admitting the evidence submitted by respondent to be true and interpreting all of the evidence most strongly against appellant and in a light most favorable to respondent.”

also in *Hurst v. Peterson*, 189 Wash. 169, 64 P. (2d) 788, at page 172 as follows:

“In weighing the sufficiency of the evidence on a motion for judgment *non obstante veredicto*, the court is to take that view of the evidence most favorable to the party against whom the motion is made,

and where the motion is made by the defendant the plaintiff is entitled to the benefit of any favorable evidence adduced by the moving party. *Fleming v. Buerkli*, 159 Wash. 460, 293 Pac. 462.”

To the same effect are: *Moen v. Chestnut*, 9 Wn. (2d) 93 (101), 113 P. (2d) 1030; *Smith v. Leber*, 34 Wn. (2d) 611 (614), 209 P. (2d) 297; and *Bulette v. Bremerton*, 34 Wn. (2d) 834 (836), 210 P. (2d) 408.

The same rule is announced in the following federal cases: *Perkins v. Northern Pac. Ry. Co.*, 199 Fed. 712 (715) (9th Cir.); *Port Angeles Western Ry. Co. v. Tomas*, 36 Fed. (2d) 210 (9th Cir.); and *E. K. Wood Lumber Co. v. Anderson*, 81 Fed. (2d) 161 (166) (9th Cir.). See particularly *Smith v. Shevlin-Hixon Co.*, 157 Fed. (2d) 51 (53-54) (Ore.) (9th Cir.) wherein it is stated:

“It is hornbook law that, on a motion for directed verdict, the evidence adduced by the opposing party shall be taken as true and all reasonable inferences deducible therefrom shall be given their most favorable intendment. This rule is recognized in the jurisprudence of Oregon.”

Evidence to sustain a verdict must be substantial. By substantial evidence is meant that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. *Ruff v. Fruit Delivery Co.*, 22 Wn. (2d) 708, 157 P. (2d) 730; *Neel v. Henne*, 30 Wn. (2d) 24, 190 P. (2d) 775.

From the foregoing we consider the rule applicable in this case to be that the trial court, when passing upon the motion for judgment notwithstanding the verdict, was not permitted to exercise any judicial discretion or

to weigh the evidence in any particular. The State of Washington, which occupied the position of contestant and was contesting the motion for judgment notwithstanding the verdict, was entitled to have the evidence construed most favorable to it and this included all of the favorable evidence in the case whether introduced by the state or by the government. We feel, therefore, that the court has erred in holding that the evidence in this case was not substantial, in substituting its judgment for that of the jury and in determining from all of the evidence in the case that the jury was in error in arriving at its verdict. This conclusion we consider amply sustained by the evidence, the testimony and the exhibits.

II. General Rule in Highway Condemnation

When a highway is condemned to convert it to a superior public use, the condemning authority must pay just compensation for the taking of the highway, the same as for the taking of any other property or interest. U. S. Constitution, Amendments 5 and 14; *Town of Nahant v. United States*, 136 Fed. 273; 69 L. R. A. 723, Reaffirmed in 153 Fed. 520; *Town of Bedford v. United States*, 23 Fed. (2d) 453; *United States v. Wheeler TP.*, 66 Fed. (2d) 977; *United States v. Des Moines County*, 148 Fed. (2d) 448.

In the above *Bedford* case the Circuit Court of Appeals for the First Circuit stated on page 457 of the opinion found in 23 Fed. (2d):

“ * * * But the Federal Government’s power of eminent domain—necessarily implied as an efficient and appropriate means of exercising other powers expressly given—is to be used subject to the broad limitations of the Fifth Amendment. It is a stranger

to the town. It can no more take, without compensation, their property rights, than it can those of an individual."

The measure of just compensation for the taking of a highway or a portion of a highway is the cost of the construction of a reasonably necessary substitute for the highway or portion taken. This may be substantially more or less than the cost of the construction of the highway or portion taken. *U. S. v. Wheeler TP.*, 66 Fed. (2d) 977; *Jefferson Co. v. T.V.A.*, 146 Fed. (2d) 564; *U. S. v. Arkansas*, 164 Fed. (2d) 943; *U. S. v. N. Y.*, 168 Fed. (2d) 387; *California v. U. S.*, 169 Fed. (2d) 914; *U. S. v. Los Angeles County*, 163 Fed. (2d) 124; *City and County of Honolulu v. U. S.*, 188 Fed. (2d) 459; *City of Fort Worth, Texas v. U. S.*, 188 Fed. (2d) 217.

In *United States v. Des Moines County*, 148 Fed. (2d) 448, on page 499, the Court of Appeals for the Eighth Circuit stated:

" * * * If it is unnecessary to replace the roads or provide substitutes for them, the appellees have suffered no money loss and have been relieved of the burden of maintaining the roads taken. *If it is necessary for the appellees to provide substitute roads in order to readjust their system of highways, they are entitled to the cost of constructing the necessary substitute roads, whether that be more or less than the value of the roads taken.* This cost will give to the appellees the actual money loss which will be occasioned by the condemnation, and is the proper measure of damages for the taking." (Emphasis ours.)

The question of the reasonable necessity of providing a substitute for the highway taken is a question of fact, or for the jury. There may be necessity for such sub-

stitute, even though existing facilities may carry the traffic in some manner.

U. S. v. Alderson, 53 F. Sup. 528, contains the following expression of the rule at the bottom of page 529 of the above volume:

“The first question for the jury in this case is whether roads 7,11, 12/7, 14/1 and 15 which the State asks to be improved, are or are not reasonable practical county roads. * * *”

In *City of Fort Worth, Texas v. U. S.*, 188 Fed. (2d) 217, the Court of Appeals, Fifth Circuit, states:

“ * * * Since the question of just compensation, or what is necessary to provide a substitute facility, is one of fact for judicial determination, there could be little ground for questioning the Court’s finding were it not for the reliance which the Court apparently placed upon the presence of an expressway, constructed by the City, State and Federal Government as an adequate facility at the time to handle all of the traffic, and his further reliance upon the use of that part of Pecan Street now designated as Highway No. 81 A, likewise already in existence.”

The following cases are also indicative of the fact that necessity of substitution is a jury question: *U. S. v. Des Moines County*, 148 Fed. (2d) 448; *U. S. v. Los Angeles County*, 163 Fed. (2d) 124; *City and County of Honolulu v. U. S.*, 188 Fed. (2d) 459.

The Secondary State Highway 11-A, twenty-eight miles of which was taken by the Government in this action, was operated and maintained by the Washington State Department of Highways and the Director thereof as a part of the State Highway System under and by virtue of Sec. 12, Chapter 207, Laws of the Legislature of Washington, 1937, which reads as follows:

"SEC. 12. Secondary state highways as branches of Primary State Highway No. 11 are hereby established according to designation and description as follows:

"(a) Secondary State Highway No. 11-A; beginning at Connell on Primary State Highway No. 11, thence in a westerly direction by the most feasible route to Yakima on Primary State Highway No. 3; the director of highways of the State of Washington shall provide suitable facilities for vehicle and pedestrian crossing of the Columbia river at the point where secondary State Highway No. 11-A, as herein described, crosses the river, and shall maintain said means of crossing at the expense of the State of Washington and without charge to the traveling public;"

At the conclusion of the trial of the case the Court properly submitted to the jury as part of its instructions the following:

"The first question for you to decide, members of the jury, is whether, at the time of the taking of the portion of highway 11-A, there was reasonable necessity for the construction of a substitute highway. If there was no such necessity, then the state of Washington is entitled only to a nominal award and you should so indicate on form of verdict number 1, which I shall supply you, and which I shall explain to you later on in these instructions." (Tr. 597)

"If you determine that a substitute highway to take the place of highway 11-A was reasonably necessary at the time of the taking in 1943, it will be your duty to determine the sum which will compensate the state of Washington and make it whole for such taking, and on form of verdict number 2 with which you will be supplied, you should fill in the amount which would have represented the cost in July, 1943, to the state of Washington to construct such substitute highway on the route determined, to

substantially the same quality and standard as the highway taken.” (Tr. 600)

The jury returned verdict number 2 in the amount of \$581,721.91 in favor of the State.

By its ruling in setting aside the verdict (Tr. 615-619) (Appendix “B”) the Court has substituted its determination on the two above factual questions submitted for that of the jury. The Court gave little, if any, consideration to the above rule that the evidence was to be accorded every reasonable inference to sustain the verdict. In fact the Court felt that in any event the matter should be passed upon by this Court of Appeals for he said:

“While I may be over-simplifying it, I think much the same situation exists here, and I’m impressed by this practical situation, that this case probably should go to the Court of Appeals anyway, and it seems to me it would be to the interest of both parties for this matter to be decided without a new trial, and if the Court of Appeals decides, as it would be in a position to decide the same as I am, there’s no particular weight will attach to my judgment in this case, the Court of Appeals will decide from the record whether there’s sufficient evidence to support the verdict, and if there is, I’ll be directed to re-instate it. That may be rather cold comfort to the state in this case, but there is that practical situation. I don’t think any of us are particularly eager to retry this case, because we have the same issues and the same problems, and I think probably the jury would do much the same thing if they had the question to decide under the evidence submitted.” (Tr. 617-618)

That the evidence was substantial and conclusively sustained the verdict and the motion for judgment notwithstanding the verdict should have been overruled is

clearly shown by those portions of the evidence hereinafter set forth from the record.

III. Evidence Sustaining Verdict

Secondary State Highway 11 A extended from Yakima to Connell. Prior to 1943 there were four ferry crossings on the Columbia that were used to connect 11 A with other highways. They were the Richmond Ferry at Vernita, the Wahluke Ferry at Wahluke, the White Bluffs Ferry at White Bluffs (Tr. 394-395), and the free state ferry at Hanford on 11 A. In 1941 there were 17,314 vehicles that crossed the state ferry alone at Hanford and which used 11 A either on one or both sides of the Columbia River. (Tr. 397, Exh. 19) In 1942, the first year of full scale gas rationing, there were 14,450 vehicles over that ferry alone. (Tr. 398) The ferry operators, Wurtz (Tr. 579) and Moede (Tr. 588) stated that ten to fifteen per cent of the cars using that ferry were from Hanford or White Bluffs.

Prior to the commencement of Hanford Works Project, Hanford and White Bluffs were two rather isolated unincorporated communities in northern Benton County. Highway 11 A ran through the smaller Hanford, and the connection was between Primary State Highways 11 and 3 at Connell and Yakima. It was an integral part of the State Highway system, giving an alternate route and a short route from Yakima to Connell and Spokane (Tr. 88, Exh. 4), and from Spokane to southwest Washington over White Pass (Tr. 283-286). The highway connected Yakima, a point where connecting

highways merged, with the Pullman-Colfax area (Tr. 334) and with the area around Connell and Ritzville (Tr. 155). The highway was used as a short route by truckers and tourists to escape traffic on other routes. (Tr. 333, 336, 344, 353) It was also a connecting link between Central Washington and the highway south to Portland (Tr. 583). The importance of the highway from a state-wide standpoint is illustrated by Exh. 3, the map of the State Highway system.

The removal of the center segment of twenty-eight miles has rendered 11 A of no value as part of the state system. Traffic therefore is forced to use the routes through Pasco or Ellensburg (Exh. 3), which are both two lane highways and heavily traveled. Thus the travel to and from Central Washington, the Columbia Basin area, and Yakima has been cut off except through congested areas and on the above highways that had already in 1943 reached a saturation point.

This is also true as to travel between points in east central Washington and western Washington, and between points in northeastern and southwestern Washington.

By this taking the state was in 1943, and has been since, prevented from using and improving the highway as a short route between the points above mentioned and a substitute route is essential to the system.

The reasonable necessity of providing a substitute highway for that part of State Highway 11 A taken on July 23, 1943, was shown by the State Highway engineers.

R. H. Pyle, district location engineer for the highway department (Tr. 70) and engaged in highway work for 27 years, testified that it was necessary to relocate State Highway 11 A as soon as possible after its closure (Tr. 227), and that the relocation Route 3 was necessary and feasible.

O. R. Dinsmore, civil engineer and assistant director of highways, and formerly acting director for the State (Tr. 297), with 28 years of highway experience, testified that in his opinion the relocation of State Highway 11 A was necessary after it was closed and the proposed route was a reasonable substitute. (Tr. 286-287) He also testified that there was a demand for the relocation of State Highway 11 A. (Tr. 305)

T. P. Doyle, district engineer, corroborated Mr. Dinsmore's testimony (Tr. 311-312) that the relocation was necessary and the proposed route No. 3 was a necessary and feasible substitute. Mr. Doyle (Tr. 385) further testified that there was no highway crossing of the Columbia River from Pasco to Vantage, a distance of 90 miles, and that the Pasco bridge was a two lane bridge.

R. H. Kenyon, a highway engineer for 31 years, was formerly district engineer and at the time of trial was engineer of plans and contracts, headquarters office. (Tr. 318) He had held many consultations with the Corps of Engineers concerning the relocation of the route of Highway 11 A. (Tr. 319) He testified that Highway 11 A was an essential part of the State Highway system and that it was essential to relocate it via route 3, Exhibit 3. (Tr. 320-321) He further testified that the highway bridge at Pasco

in 1943 carried an annual daily average of 4,300 vehicles (Tr. 323) and the highway north of Yakima, 4,000. The capacity load on a double lane highway was 4,000 vehicles per day. (Tr. 287)

If the engineering testimony had been all of the state's evidence on feasibility and the necessity for re-establishment, that evidence would be sufficient under the laws of the State of Washington. The authority to lay out highways is vested in the department of highways acting through its Director.

Chapter 53, Section 25, Laws of 1937, p. 146 (Rem. Rev. Stat. 6400-25) (RCW 47.12.010) provides as follows as to primary highways:

“ * * * In case of condemnation to secure such lands the action shall be brought in the name of the State of Washington in the manner provided for the acquiring of property for the public uses of the state, and in such action the selection of the lands by the director of highways shall, in the absence of bad faith, arbitrary, capricious or fraudulent action, be conclusive upon the court and judge before which the action is brought that said lands are necessary for public use for the purposes sought. * * * ”

And Chapter 53, Section 31, Laws of 1937, p. 152 (Rem. Rev. Stat. 6400-31) (RCW 47.28.010) gives the Director these further powers:

“SEC. 31. Whenever the general route of any primary state highway shall be designated and laid out as running to or by way of certain designated points, without specifying the particular route to be followed to or by way of such points, the director of highways shall determine the particular route to be followed by said primary state highway to or by way of said designated points, and shall be at lib-

erty to select and adopt as a part of such primary state highway, the whole or any part of any existing public highway previously designated as a county road, primary road or secondary road or now or hereafter classified as a county road. The director of highways need not select and adopt the entire routes for such primary state highways at one time, but may select and adopt parts of such routes from time to time as he deems advisable. Where a primary state highway is designated as passing by way of a certain point, this shall not require the director of highways to cause such primary state highway to pass through or touch such point but such designation is directional only and may be complied with by location in the general vicinity. The director of highways is empowered to construct as a part of any primary state highway as designated and in addition to any portion meeting the limits of any incorporated city or town a by-pass section either through or around any such incorporated city or town."

Chapter 207, Section 20, Laws of 1937, p. 1012 (Rem. Rev. Stat. 6402-20) (RCW 47.04.030) provides that all powers given the Director as to primary highways apply to secondary highways as well:

"SEC. 20. The director of highways shall have all the powers and perform all the duties with respect to secondary state highways, described and designated by this act, as have been or may be by law granted with respect to primary state highways so far as the same are consistently applicable. All provisions of the law of this state with respect to the construction, reconstruction, location, relocation, alteration, repair, improvement, maintenance, care and protection of primary state highways of this state shall apply to secondary state highways described and designated by this act and all powers and duties of public officers of this state with respect to the receipt and use of funds of the Federal government

relating to primary state highways shall apply to secondary state highways. * * *

The Supreme Court of Washington in *State ex rel. Coyle v. Superior Court*, 128 Wash. 460, 223 Pac. 3, on this subject stated:

“Under ch. 32, Laws of 1921, p. 116 (§ 6766, Rem. Comp. Stat.) (P. C. § 6786), it is provided ‘that in such action the selection of the lands by the supervisor of highways shall, in the absence of bad faith, arbitrary, capricious or fraudulent action, be conclusive upon the court and the judge before whom the action is brought that said lands are necessary for the purposes sought.’ Viewing the testimony in the light most favorable to the relators, it shows only that there is a difference between experts as to which route is the most practical and satisfactory. The testimony clearly shows that full consideration was given by the public officials charged with that duty of the entire situation as it related to both routes, and that they were possessed of all practical and expert information regarding the matter, and, after a thorough study, the new route was decided upon as being the proper one on which to construct and improve a permanent highway. Under such conditions the court is forbidden by the statute to hold that the lands selected for the new route are not ‘necessary for the purpose sought.’ * * *

The importance, continued use and necessity for re-locating the state highway as of the date of the taking, is clearly reflected by defendant’s Exhibit 10 (Appendix “C”). This exhibit also shows the extent of negotiations conducted over a period of practically eight years between the state and government officials to the end that the state highway be either returned to the state after the war or relocated.

The testimony of the State Highway engineers Pyle, Doyle, Kenyon and Dinsmore, on the question of necessity and feasibility of the relocated route No. 3, as above epitomized and referred to in this brief, was not the result of expert opinion formed for trial purposes but was a result of conclusions drawn, statements made and positions asserted by them for the state prior to the taking in 1943, at the time of the taking, and at all times subsequent thereto up to the time of trial. This is also amply illustrated by Exhibit 10 (Appendix "C") and the various letters contained therein.

Said exhibit further evidences that the government officials realized the necessity and importance of either preservation and return or relocation of the highway for the state.

On the above points from Exhibit 10 (Appendix "C") we respectfully refer to the following excerpts therefrom:

1. Letter of April 16, 1943, from Norman G. Fuller, Real Estate Project Manager for the War Department, to R. H. Kenyon, District Superintendent, State Highway Commission, indicating the portion of the state highway to be closed to the public and taken and the portion thereof to remain open and be maintained by the state. (Appendix "C," pages 51-53)
2. Letter of June 29, 1943, from Howard Tustin, Special Attorney, Lands Division, Department of Justice, to the Attorney General of Washington, showing the state wished to continue its operation and use of the highway and that the government might accede

to the taking of only a leasehold interest for the duration of the war period and six months thereafter, instead of the fee. (Appendix "C," pages 54-56)

3. Letter of July 7, 1943, from the State Attorney General's office to the War Department, Division Engineer, to the same effect and suggesting a conference between the state and government officials involved. (Appendix "C," pages 57-58)

4. Letter of August 3, 1943, from Lt. Col. F. T. Matthias, Area Engineer, U. S. Engineer's office, to the Department of Highways concerning relocation studies and possibilities. (Appendix "C," pages 58-59)

5. Letter of April 29, 1944, from the State Attorney General's office to Bernard H. Ramsey, Special Assistant to the U. S. Attorney General, showing that in conference the government officials would attempt to return the fee to the highway taken, either by amendment to the Declaration or by stipulation, or in the alternative within one year advise the state as to whether it could relocate the highway through a portion of the project. (Appendix "C," pages 71-72)

6. Letter of April 10, 1945, from the State Attorney General's office to Frank Reed, Special Assistant to the U. S. Attorney General, calling attention to the lapse of one year without return of the fee or settlement of the relocation route. (Appendix "C," pages 72-76)

7. Letter of September 20, 1945, from Bernard H. Ramsey to the office of the State Attorney General, portions of which we here set forth:

"First, let me assure you that the War Department and the Department of Justice are both entirely sympathetic toward the desire of the State to have this highway returned to the State. Both departments are fully advised that the State considers this highway as an indispensable link in the postwar development plans for serving the Columbia basin area with adequate highways. I assure you that there is no disposition of any government agency to do anything other than cooperate as fully as possible with the State for making possible the completion of these plans.

" * * * * *

"I am convinced that if the State of Washington is willing to accept the fact that it will probably be impossible to permit the use of this highway by the general public for a considerable period of time, at a minimum three years after the end of the present emergency, that it will be possible to work out a solution to the problem that will be mutually satisfactory to the Government and to the State of Washington. I am confident, however, that the War Department cannot and will not consider returning the highway to the State for the general use of the public short of the period indicated.

"The other matters discussed can, I am sure, be agreed upon if the State is willing to agree to this delay in the return of the highway. I am sure that the War Department would stipulate the dismissal of the present condemnation proceeding for the acquisition of the fee title to the road, and would be willing to amend the proceeding to acquire instead a leasehold interest coupled with the exclusive possession and use clause for the period agreed upon.

"As I understand the position of the State, if this matter can be worked out satisfactorily, the State would be willing to waive any compensation other than the return of the highway with any additions and improvements made by the Government during its period of occupancy.

"May I be permitted to express my deep appreciation of the very cooperative attitude shown by the State in this matter, and particularly by your office and by the office of the State Commissioner of Highways. While we have encountered many difficulties in attempting to find a solution in this matter, it has been, and I can assure you will continue to be, a pleasure to work with you in seeking a solution mutually satisfactory to the State and to the Government."

8. Letter of April 2, 1946, from State Attorney General's office to Mr. Ramsey enclosing stipulation for return of the highway to the state. The stipulation appears at Appendix "C," pages 81-85, the letter at Appendix "C," pages 86-87.

9. Letter of July 18, 1946, from Don. E. Meldrum, War Department, to the State Attorney General, explaining the government's rejecting of the stipulation. (Appendix "C," page 97)

10. Letter of October 14, 1946, from Mr. Ramsey to the State Attorney General's office indicating that the matter of return of the highway or relocation of the same should await further consideration by officials of the Manhattan District and the Atomic Energy Commission. (Appendix "C," pages 102-103)

11. Letter of September 2, 1949, from Fred C. Schlemmer, Manager Hanford Operations Office, Atomic Energy Commission, to the State Director of Highways finally stating that the state could not relocate the highway across the Wahluke Slope (Route 2, Exhibit 3) but could relocate from Vernita to

Beverly to Othello (Route 3, Exhibit 3) (Appendix "C," pages 121-122)

12. Letter received November 25, 1949, by the Department of Highways from B. D. Reams, Assistant Adjutant General, U. S. Army, 2nd Infantry Division, finally refusing permission to the state relocating through the Yakima firing range area. (Appendix "C," pages 123-124)

Analysis of Exhibit 10 can lead only to the conclusion that the state at all times since the taking sought, first a keeping of, or return of, highway to it, and, second a relocation thereof by the most feasible route. In the latter connection routes across Umptanum ridge and Wahluke Slope were surveyed and it was not until September and November of 1949 that the two aforesaid routes were denied to the state. As a consequence the state highway engineers have determined and so testified that Route 3, Exhibit 3, is a necessary and feasible relocation of the highway taken.

Further emphasizing the necessity of the relocation of State Highway 11 A the State called two engineers. One was O. E. Brashears, County Engineer of Yakima County. He had an early and intimate knowledge of 11 A and expressed his opinion (Tr. 294, 295) that it was a necessary part of the State system in 1943 and that its relocation over Route 3 was necessary and practical. The other engineer was James M. Berkey, the Chief of the Community Development Section of the Columbia Basin project for the Bureau of Reclamation. (Tr. 105) His

office had the responsibility of laying out road patterns. His testimony is discussed later in this brief.

Local residents of Connell detailed the use made of 11 A, the demand for it and the necessity for a relocation. Loen Bailie, a farmer who lived near Mesa, traveled 11 A frequently before it was closed. (Tr. 91-92) He felt that Route 3, Exhibit 3, would be a reasonable relocation and necessary. (Tr. 95) John Dougherty, a service station operator at Connell, testified to the use made of 11 A (Tr. 333 to 335) and to demand for relocation. He said: "Oh, I'd have lots of people come in there and want to know if they could get through the project, if that route was still open or closed, also have some of them that would go down there and couldn't get through and have to come back." (Tr. 336-337) Further he stated that there was a demand for relocation of Highway 11 A over Route 3.

O. S. Bailie, Mayor of Connell and the operator of a grocery store, testified that there was a demand for a substitute highway over Route 3 and that after 11 A was closed people stopped and inquired at the store if they could get through 11 A. (Tr. 345) Ben Klindworth, a real estate and insurance man from Connell and the Secretary of the Chamber of Commerce, testified that he frequently used 11 A when available (Tr. 351), that all kinds of traffic used 11 A (Tr. 353), that there was a substantial demand for a substitute over Route 3, although Route 2 would be preferable. (Tr. 355)

B. A. Perham, chairman of the Yakima Chamber of Commerce Committee on roads and highways (Tr. 153) in 1943, testified to a demand for 11 A and the necessity

for its relocation over Routes 2 or 3. (Tr. 158, 159) Loren Mackham, manager of the Yakima Chamber of Commerce, and a long time resident of Yakima (Tr. 166) gave his opinion that the relocation of 11 A over Route 3 was necessary. (Tr. 168-170)

What proof is to be deemed sufficient to establish the "reasonable necessity" for the relocation of 11 A? Here we have submitted to the jury the testimony of State Highway engineers, who are required by statute to maintain highway 11 A. They are experts and have given their opinion of the necessity for relocation of the highway. The local residents have testified to the use made of the highway before it was closed, and to the demand for it when not reopened. How and in what manner could a demand or a necessity for the relocation of the highway otherwise be shown?

To sustain the court's position all the evidence, it seems, must be ignored so that the only remaining question would be "is the proposed route shorter than other existing routes"? As a result of the taking in this case there is now no highway crossing of the Columbia River in the central part of the State of Washington for a distance of 90 miles along the river between Vantage and Pasco. Certainly the state is entitled to a highway crossing of the river within that area and to a highway serving all of the purposes formerly served by 11 A before the taking. The state is entitled to an alternate route to relieve traffic congestion and to connect and make its highway system as nearly complete as it was before the taking. The state cannot be forced to carry traffic on other existing and congested highways just because the Court has deter-

mined that the only thing that will establish necessity for replacement is a saving in distance.

The state further calls attention to the testimony of State Senator W. C. Raugust (Tr. 360-361), a member of the Roads and Bridges Committee of the State Senate. He likewise expressed his feeling of the necessity to relocate the highway. Also Senator Nat U. Washington of Ephrata, likewise a member of the Senate Committee and a member of the interim committee on highways, testified (Tr. 376, 377) that the relocation of 11 A on Route 3, (Exh. 3) was necessary.

Julia Butler Hansen, Chairman of the House Committee on Roads and Bridges, testified that her committee designated primary and secondary state highways. (Tr. 367) She stated relocation of 11 A was necessary. (Tr. 373)

Testimony of two of the government witnesses would likewise appear to sustain the verdict. Lars Langloe testified he considered Routes 2 and 3 on exhibit 3 to be a reasonable substitute for Highway 11 A. (Tr. 525) Mr. Langloe was an engineer called by the government. Charles Parker, another engineer, testified the lack of traffic over 11-A was due primarily to the condition of the surfacing. The state was asking only that the substitute on Route 3 be built to connect the two ends of 11 A to the same standard as 11 A. The state should not lose the highway without compensation merely because the demand was curtailed due to lack of a hard surface.

EXHIBITS REJECTED AND TESTIMONY EXCLUDED

The State cannot build highways without first planning them. Columbia Basin development was a reality in 1941 and time alone was required to permit it to unfold. The Columbia Basin Project Act of March 10, 1943, 57 Stats. 14, gave authority to the Bureau of Reclamation to study highways and was a device to establish the road network found desirable into, within and from the Basin area. Problem 19 of Columbia Basin Joint Investigation (Iden. 5- rej. Tr. 107, 133, 139) incorporated in it the Davis (state) report of 1941 (Tr. 282, 283, 301 to 305, Iden. 11 and 11-A- Rej.) hereinafter mentioned.

For the convenience of the Court there is printed as Appendix "D" (Pages 133-175) portions of Identifications 5 and 11 that touch upon the studies of the highway system as it affects the area served formerly by 11 A. These were studies made under government authority prior to the taking in this case, and were offered by the state and rejected by the Court at the trial.

The necessity for continued use and value of Highway 11 A is shown by the testimony of James M. Berkey (Tr. 141 to 152), which was excluded. Mr. Berkey, an expert in community planning, had charge of the division of the Bureau that advised on the location of highways. His training, experience and employment all fitted him to express an opinion on the subject under investigation. Yet the Court excluded his testimony and rejected the exhibits offered with it. (Iden. 5 and 6 Rej. Tr. 140 to 152) Identification 5 is the report of the investigation of highways in the Columbia Basin (Appendix "D" pages

133-159.) Identification 6 is the map prepared in Mr. Berkeley's office showing the area of the Columbia Basin Project, colored to show the lands included in the development under way at the time of trial (Tr. 141-143). It shows the area naturally tributary to 11 A and its substitute.

The ordinary rules of determining value in condemnation cases do not apply here. The Court has determined that, since the Columbia Basin was not actually being physically developed in 1943, the projected development was not material. Such might be the rule if a farm were being condemned for a highway. Such is not the rule when a highway is being condemned and closed.

The State's view is that the taking of a highway from the system, closing it and foreclosing the state from using or improving that route should entitle the state to show all proposed developments that had a bearing on its present and future use, even though that same proposed development in the ordinary condemnation case might not affect the market value of the property surrounding the highway.

Identifications 11 and 11 A rejected (Tr. 301-305) were prepared by the Washington State Department of Highways and submitted as a report to the state legislature in April of 1941. (Appendix "D" pages 159-175.) They were the basis of the report of the Bureau of Reclamation investigators on the above mentioned problem 19. (Appendix "D," pages 133-159 *supra*.) The state report was made to comply with the Act of the State Legislature, Ch. 169, Laws of 1939. (Tr. 133 to 135) We deem the rejection of these Identifications 11 and 11-A as error by the

Court because the plans and proposed developments existing in 1941 were certainly material to show necessity and demand for continued use of highway 11 A or a substitute therefor in 1943. Likewise the studies of the Yakima group (Iden. 7 and 8 Rej., Tr. 171 to 178) were of importance in determining population trends upward and the nature of the facilities at Yakima which could have been available to Central Washington through 11 A if the highway had remained open, and which will become and remain so available upon construction of the substitute or relocated portion of said highway involved in these proceedings.

When the Court said in its order, “ * * * that no substantial evidence was adduced in the trial of said cause establishing or tending to establish the necessity for a replacement of Washington State Highway 11 A, * * * ” we submit as error that the Court excluded evidence which was substantial. The proposed future development of tributary areas would certainly tend to establish the necessity for replacement. The Court erred in the exclusion of the evidence and exhibits that described the Columbia Basin development, showed the highway requirements of the areas served by the highway taken and the necessity for constructing a substitute therefor so as to make a connection between the termini of that highway taken. This we consider error on the Court's part that was cured by the verdict, but is now emphasized by the Court's setting aside the verdict.

CONCLUSION

The government's contention throughout the trial in this case, and the theory of the court as reflected in its opinion granting the motion for judgment notwithstanding the verdict, (Tr. 615 *et seq.*, Appendix "B"), are at variance with the applicable legal principles as set forth in the cases cited above, and in particular with the statements made in *City of Fort Worth, Texas v. United States*, 188 Fed. (2d) 217, (222) and in *Town of Bedford v. United States*, 23 Fed. (2d) 453, which statements are hereinafter set forth:

" * * * However, it will not at all do to say that in determining the cost of providing any necessary substitutes, an award in condemnation may be denied because there are already in existence other available routes which will in some fashion handle the traffic diverted by the condemnation. * * * In any event, as is clearly shown by *United States v. Des Moines County, supra*; *Jefferson County, Etc. v. Tennessee Valley Authority*, 6 Cir., 146 F. (2d) 564; *United States v. Los Angeles County*, 9 Cir., 163 F. (2d) 124, and other cases which could be cited, the rule universally enforced in such an instance recognizes the existence of the duty of a municipality to provide for a necessary readjustment of its traffic facilities and that the amount of compensation proper in such a case is the cost of constructing necessary substitute facilities in order to replace and rearrange its traffic arteries. In broad outline, the property taken is a part of the City's traffic system which it is under the duty to replace if necessary. In any proper view of the requirements of just compensation, the substitute 'necessary' is that necessary to readjust its street and highway system to serve the municipality's requirements and needs in as adequate a manner and extent and with equal utility as such

system would have provided had the facility in question not been condemned, so far as this is reasonably practical. *United States v. Los Angeles County, supra*, 163 F. 2d 124." *City of Fort Worth, Texas v. United States*, 188 Fed. (2d) 217 (222).

"It should not be overlooked that, when our highway law took form, 'ways' were hardly more than strips of land, slightly, if at all, improved. To-day, as a result of the automobile, a large part of our highways are structures of stone and cement, costing more per mile than the original cost of many of our railroads. We can see neither logic nor justice in attempting to distinguish between such structures in the street as sewers, water pipes and buttresses of bridges, and the structure constituting the way itself, and the right of the town to the use of the land, apart from any expenditure previously made thereon, by the town. The real question is one of the incidence of cost or expenditure; and there is no such thing as compensation, within the fair meaning of the word, unless the separate entity that under sovereign power appropriates a part of this town way is required to pay the expenses it thus imposes upon the town within whose territory it makes the taking." *Town of Bedford v. United States*, 23 Fed. (2d) 453.

It therefore appears that the existence of other highways and the physical condition of the highway taken, as a legal proposition in this case, cannot have any bearing on necessity for construction of a substitute highway.

We submit that the opinions of engineers and other experts do show a reasonable necessity for the substitute highway involved. The uses made of the highway, the requirements of the area and the prospective development all show that the highway as it existed was necessary to the State Highway system and that a reasonable substitute was afforded. The verdict was well within the

amount as stated in the testimony of the witnesses. Certainly under the rule stated the State of Washington in this case is entitled to have the evidence introduced by it given every reasonable inference to sustain the verdict of the jury. We respectfully urge that the lower court be reversed and that the verdict be reinstated.

Respectfully submitted,

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Appendix A

APPENDIX "A"

OPINIONS

MOTION FOR DIRECTED VERDICT AT CLOSE
OF STATE'S TESTIMONY

"Mr. Ramsey: If the Court please, at this time the government moves for a directed verdict in this case, directing the jury to return a verdict herein for a purely nominal sum. * * * " (Tr. 408)

"THE COURT: I think unquestionably in a case of this character there are two questions to be decided, that is, perhaps I should say two principal questions to be decided by the trier of the facts; first, whether at the time of taking and under the circumstances then existing there was reasonable necessity for the building of a replacement or substitute road to take the place of the one taken, and then if the trier of the facts finds that, what was at that time the fair and reasonable cost of building a substitute road comparable in kind and quality to the road taken.

"I think that those are questions of fact, both of them, and questions of fact for the jury if there is any evidence upon which to submit them, and in that respect I think that I am in the same situation that I would be in any case where the sufficiency of the evidence is questioned at the close of the case of the party having the burden of proof, and that is not what I would hold or what looks to me to be the most reasonable or where the weight of the evidence is, but whether there is any substantial evidence, viewed in the light most favorable to the party having the burden of proof, that could sustain a verdict, and I think here, without going into detail, that in my judgment there is

substantial evidence, viewed in the light most favorable to the defendant, upon which a finding that there is a necessity for replacement could be based by the jury, so that the motion will be denied. The Court will take a ten minute recess before proceeding.” (Tr. 414, 415) (Italics ours.)

MOTION FOR DIRECTED VERDICT AT CLOSE
OF ALL THE TESTIMONY

“MR. RAMSEY: No other testimony, if the Court please. At this time I do want to renew my motion for a directed verdict on the same grounds as urged at the conclusion of the state’s case.

“THE COURT: It will be denied, and exception allowed. * * * ” (Tr. 591)

Appendix B

APPENDIX "B"**COURT'S RULING ON MOTION FOR NEW TRIAL OR
JUDGMENT NOTWITHSTANDING THE VERDICT**

Yakima, Washington

Friday, December 21, 1951

Before Hon. Sam M. Driver, United States District Judge.

"THE COURT: This case I might say has given me great concern because of the novelty of the questions involved and the importance of it, of course, to both the state and the government, and the feeling that I had from listening to the evidence and from the verdict which the jury returned, the very definite impression that I had was that the jury was over impressed by two considerations, one that a road that cost a considerable amount of money to the state, or the county and the state, having been taken, that compensation should be paid for it, that the government shouldn't take something of great value and not pay for it, and the other thing I think that impressed them, and there was so much of that that came into the evidence despite rulings and objections, and that was that there should be a connection between Yakima and the Columbia Basin area because of the development there that is in prospect. I'm always hesitant to set aside a verdict because it isn't in accordance with the weight of the evidence in a case of this character, because that would mean another jury trial probably on much the same type of evidence before much the same type of jury with probably the same substantial result, and we have to stop trying these cases sometime, we can't try them over and

over, but it seems to me extremely doubtful, to say the least, that there is substantial evidence here of a character which the jury could reasonably accept that there was a reasonable necessity for the replacement of this highway. The necessity for serving the immediate area was eliminated by the fact that the area immediately served was taken by the government. All of the immediately adjacent landowners there had their lands taken, as we all know, of course, so that I think properly so, as a matter of strategy in the trial, the state particularly stressed not the necessity to replace local highway needs, but the proposition that this highway was integrated with the state highway system, and that as a part of the state highway system there was a necessity to replace it to keep the general system intact and to meet the general needs of the state, and a great deal was said about the White Pass and the connecting highways to the east, so that there was a great deal of stress placed upon the proposition that it was necessary to build a connection road from Yakima to the vicinity of Connell.

“Now, it doesn’t seem to me that since there is an established highway which apparently, according to the undisputed proof here, is shorter than the proposed road, there isn’t any showing as I recall that under the conditions then existing or even existing at the time of the taking or at the time of the trial that those roads, the primary highways through Kennewick and Pasco to Connell, weren’t fully capable of carrying the traffic that they might be called upon to carry. Of course I’m fully aware of the proposition that a jury’s verdict should stand if there is substantial evidence or reasonable inference

from the evidence which would support the verdict, but I am also impressed by the fact that we have to stop somewhere in the matter of letting the jury accept testimony that may be contrary to the undisputed—to other undisputed facts and circumstances, particularly physical facts. If we had half a dozen witnesses who expressed the opinion that it's fifty miles from here to Toppenish, and that distance from here to Toppenish were an important issue in the case, I don't see how you could say a verdict based upon that testimony would be supported by that evidence when the physical facts are that it's a much less distance to Toppenish.

“While I may be over-simplifying it, I think much the same situation exists here, and I'm impressed by this practical situation, that this case probably should go to the Court of Appeals anyway, and it seems to me it would be to the interest of both parties for this matter to be decided without a new trial, and if the Court of Appeals decides, as it would be in a position to decide the same as I am, there's no particular weight will attach to my judgment in this case, the Court of Appeals will decide from the record whether there's sufficient evidence to support the verdict, and if there is, I'll be directed to re-instate it. That may be rather cold comfort to the state in this case, but there is that practical situation. I don't think any of us are particularly eager to retry this case, because we have the same issues and the same problems, and I think probably the jury would do much the same thing if they had the question to decide under the evidence submitted.

“I'm not sure of the procedure here. My conclusion is that there is not substantial evidence to support the

showing that the state would have the burden of making that there was a reasonable necessity for the replacement of this road, and that therefore the jury had nothing to decide except the question of nominal damages, and the verdict therefore will be reduced to nominal damages. That was in your motion, was it not?

“MR. RAMSEY: That’s right.

“THE COURT: And exception of course will be allowed to the state.

“MR. RAMSEY: Would it benefit the record if the government at this time moved for judgment notwithstanding the verdict, and to set aside the verdict?

“THE COURT: Very well, I’ll consider that the arguments applied to that, and it will be granted. Upon mature thought, whatever form you wish to present, Mr. Ramsey, you may serve copies on opposing counsel, and I will be in Portland, Oregon, for the next two weeks, and then in Spokane the 7th of January.” (Tr. 615-618)

Appendix C

APPENDIX "C"

**WAR DEPARTMENT
OFFICE OF THE DIVISION ENGINEER
PACIFIC DIVISION**

Prosser, Washington

Refer to File

No. CE 601.1 RE

(Hanford Engineer Works)

April 16, 1943

Subject: State Highways in Army Construction Area,
Benton County

To: Mr. R. H. Kenyon
District Superintendent
State Highway Commission
Yakima, Washington

Dear Mr. Kenyon: Defendant's Exhibit No. 10

Inclosed is a map of the Hanford Engineer Works Project in Benton County, Washington. The map is available to personnel of your organization who may be concerned with the problems involved but, otherwise, is to be regarded as confidential and is not to be publicly displayed.

Following the visit of Mr. Frank Fergeson of this office to your office on or about March 29th the recommendation of the Area Engineer regarding the vacation of roads was requested.

Following are the requirements of the Army with regard to state highways in the area:

The state highway through Area "A" should be closed and abandoned for the entire distance colored in red on the inclosed map. It is to be understood that by abandonment of the highway the state should relinquish all right, title, and interest in and to the said highway, and that the Government will be the sole owner thereof.

The portion of the state highway colored in blue and lying in the westerly portion of the Area "B" should be maintained by the state and should be open to traffic, but rigid control will be exercised on those parties using the road. It is probable that a Control Station will be established where the highway enters Area "B," and that a sign will be posted at the intersection with the county road at the easterly boundary line of Section 31, Township 13 North Range 25 E.W.M. and that the highway will be barricaded one mile to the east where it enters Area "A."

That portion of the state highway colored in purple in the easterly portion of Area "B" will remain open for public travel and is to be maintained by the state. Traffic on this portion of the highway will be subject only to limited control for the present time.

Those portions of the state highway leading to the project as colored in green on the map will not be required for military use and only limited maintenance by the state will be necessary.

Any arrangement for continued operation of the state highway ferry at Hanford will have to be made directly between the State Highway Commission and the Area Engineer at Pasco. The Prosser Real Estate Office is not in a position to enter into such agreements.

It is understood that the instructions outlined above and the abandonment stated above are to become effective May 31, 1943.

It is requested that your office take whatever steps may be necessary to conform with these recommendations. This office will be glad to be of any assistance possible within its authority.

For the Division Engineer:

Very truly yours,

NORMAN G. FULLER

Real Estate Project Manager

NGF:lh

enc.

cc: to Lieutenant Col. H. R. Kadlec

WAR DEPARTMENT
UNITED STATES ENGINEER OFFICE
PACIFIC DIVISION

Prosser, Washington

May 27, 1943

Subject: Closing of State Highway

To: Director of Highways
Department of Highways
Transportation Building
Olympia, Washington

Attn: Mr. J. W. Hoover
Assistant Director of Highways

1. With reference to your letter of May 24, 1943, the Project Manager and Colonel Kadlec conferred this date and present conditions make it apparent that the date of May 31, 1943, stated in our letter of March 30, 1943 may be extended for approximately thirty days.

2. The public necessity for the delivery of food stuffs to the remaining sections of the area and other public considerations make it advisable to extend to the public the privilege of continued use of highway 11A.

3. During the period of extension, legal arrangements may be made to definitely establish the status of both highway 11A and the Hanford Ferry. Representatives of the Prosser Real Estate Office and the Area Engineers Office will confer with you concerning these matters in the immediate future.

For the Division Engineer:

FRED H. JOHNSTON

Real Estate Project Manager

APPROVED

HARRY R. KADLEC

Lt. Colonel, C. E.

Deputy Area Engineer

DEPARTMENT OF JUSTICE

LANDS DIVISION

Empire State Building

Spokane, Washington

June 29, 1943

The Attorney General

Olympia, Washington

Attention: Mr. Harold A. Pebbles

Dear Sir:

A few days ago Mr. R. A. Moen, who is associated with your office, called upon this office regarding a question which will arise concerning the interest of the State of Washington as to the secondary highway running between Yakima and Connel. The number of this highway is 11-A.

Mr. Moen stated that he would like to have some understanding as to what procedure should be followed which would protect the interest of the State of Washington, and which would allow the State of Washington to continue its operations upon this highway, but would not prevent the State from claiming total damages at some future time as a result of the Government's condemnation of the major portion of this highway. He suggested that a stipulation be entered into between the State of Washington and the United States Government whereby this protection would be insured.

The Declaration of Taking upon this highway has not been filed as yet by the United States and therefore it occurs to me that this matter can only be handled by the State of Washington and the War Department. It is suggested that you attempt negotiations with the acquiring agency, that is the War Department at Prosser, Washington, with the view of arriving at some agreement concerning this matter.

I believe that the best solution to the problems that will arise in this matter might be best solved by an attempt to have the War Department acquire a lease-hold interest on that part of the road which is subject to condemnation, which lease-hold interest would be for the duration and six months thereafter. As above stated, it is the belief of the writer that a solution will be best arrived at by your contacting the War Department at Prosser, concerning this matter, with the hope that an amicable agreement will result thereby.

Trusting that this suggestion will be of some help
in this matter, I am

Respectfully yours,

HOWARD T. TUSTIN,
Special Attorney

HTT:O

FBR:vio

WAR DEPARTMENT
OFFICE OF THE DIVISION OF ENGINEER
PACIFIC DIVISION
Prosser, Wash.
Box 71

Refer to File
No. CE 601.1 RE
(Hanford Engineer Works)

July 2, 1943

Attorney General, State of Washington
Olympia, Washington

Re: *United States vs. State of Washington et al.*

Dear Sir:

On June 30, 1943, this office forwarded a Declaration of Taking Assembly to the Office of the Chief Engineers at Washington, D. C., covering all that portion of Secondary State Highway No. 11 A lying in Areas "A" and "B," except that portion thereof between the Southwesterly right of way line of Chieicago, Milwaukee, St. Paul and Pacific Railroad of the South or right bank of the Columbia River.

As soon as the Declaration of Taking is filed, this office will be glad to furnish you with a copy thereof.

Very truly yours,

FRED H. JOHNSTON
Real Estate Project Manager

July 7, 1943

War Department
Office of the Division Engineer
Pacific Division
Prosser, Washington

Attention: Mr. Fred H. Johnston
Real Estate Project Manager

Re: File No. CE 601.1 RE
(Hanford Engineer Works)
*U. S. vs. State of Wash.,
et al.*

Dear Mr. Johnston:

Shortly after the discussion which we held in your office on Wednesday, June 23rd, relative to the filing of a Declaration of Taking covering Secondary State Highway 11-A within A and B areas, we called at the office of Mr. Crowley in Spokane and discussed with his assistant, Mr. Tustin, the feasibility of the government taking a lease hold interest rather than a fee in the highway.

This conference with Mr. Tustin was later followed by a long distance telephone conversation between the writer and Mr. Crowley. Mr. Crowley stated that he felt that the state's request was fair and that he would make every effort to work out the situation so that the state's interests as well as those of the government could be protected. Mr. Crowley was of the opinion that this might be done by the taking of a lease hold interest instead of a fee. At any rate, Mr. Crowley advised that he would arrange for a full conference on the matter with Mr. Ramsey, Mr. Crowley, yourself, the State Highway officials, and myself present, before the filing of your declaration.

In furtherance of such contemplated conference it will be sincerely appreciated if you will kindly allow us this courtesy before proceeding with any filing in the United States District Court.

A copy of this letter is being transmitted to Mr. Crowley at Spokane. Thank you for your kind attention.

Yours very truly,

SMITH TROY

Attorney General

ST:bjh

HAP

cc: Edwin J. Crowley

By: HAROLD A. PEBBLES

Asst. Attorney General

WAR DEPARTMENT

UNITED STATES ENGINEER OFFICE

Hanford Engineer Works

P. O. Box 550

Pasco, Washington

E-1

3 August 1943

Department of Highways
Office of the District Engineer
P. O. Box 52
Yakima, Washington

Attention: Mr. R. H. Kenyon

Gentlemen:

Reference is made to map and letter of your office dated 31 July 1943 showing proposed relocation of Secondary State Highway 11-A. A thorough study by this office has been given this proposed relocation and it is felt that the road, where it traverses Area "B" comes dangerously close to Area "A". For this reason and lack of control that could be exercised on the road as laid out,

it is not deemed advisable to encourage further study of this proposal.

It may, however, be possible to obtain a right-of-way for a State Highway through certain portions of Area "E" and this office will be glad to discuss this or other possible locations, with representatives of the State Department of Highways.

Yours very truly,

F. T. MATTHIAS

Lt. Col., Corps of Engineers
Area Engineer

August 7, 1943

Mr. Edward J. Crowley
Special Attorney
United States Department of Justice
Empire State Building
Spokane, Washington

Re: *United States v. State of Washington, Benton County, et al, No. 135, District Court, Eastern District of Washington*

Dear Mr. Crowley:

This will acknowledge receipt of Order of Declaration of Taking in the above case.

The state is now in process of making survey and estimating damages and as soon as this office has been furnished with the figures, we will further advise you in the matter.

Very truly yours,

SMITH TROY

Attorney General

HAROLD PEBBLES

Assistant Attorney General

HAP:vc

January 12, 1944

Mr. Ivan Herrick, Special Attorney
U. S. Department of Justice
Lands Division
520 Miller Building
Yakima, Washington

United States of America vs. State of Washington, Benton Co. et al. Civil Cause No. 135.

Dear Sir:

On July 28, 1943, this office received copy of order on declaration of taking in the above case. Such order indicated that the sum of \$1.00 had been deposited with the Clerk of the District Court for the Eastern District of Washington, Southern Division, as compensation due the State of Washington for taking of approximately 17 miles of the traveled roadway and right of way for Secondary State Highway No. 11-A between Cold Creek easterly to the Columbia River in Benton County. Subsequent to the receipt of the aforesaid order this office, on August 7, wrote to Mr. Edward J. Crowley, Special Attorney for the U. S. Department of Justice, Empire State Building, Spokane, advising Mr. Crowley that the State was in the process of making a survey and estimating damages for the taking and further advising that as soon as such estimate and survey had been completed the State's position would be made known.

The survey and estimate above-mentioned has now been completed. However, before calling your attention to the particulars thereof we refer you to Section 12, Chapter 207, of the Laws of 1937, wherein Secondary State Highway No. 11-A is by the legislature of the State

of Washington designated to begin at Connell, thence in westerly direction by the most feasible route to Yakima.

Prior to the taking by the United States Government the Director of Highways, pursuant to the above-mentioned law had established, constructed and was maintaining Secondary State Highway No. 11-A between Cold Creek and the Columbia River on the east. In view of the taking by the United States, not only of the present Secondary State Highway No. 11-A between the points mentioned, but the entire area south of the Columbia River through which said highway could be extended, the only alternate routes left in which the highway may now be relocated and reconstructed are the following:

1) The Department of Highways has made a reconnaissance survey for a projected relocation generally running northeasterly from Yakima crossing the Columbia River at a point south of Beverly and continuing generally in an easterly direction to intersect with the present Secondary State Highway No. 11-A east of Connell. The estimated cost for this relocation and reconstruction amounts to \$2,080,500.

2) Another reconnaissance survey had indicated that as an alternative the State may make use of the present Secondary State Highway No. 11-A easterly from Yakima to a point approximately $2\frac{1}{2}$ miles within the boundary of the present Hanford Project. This alternative projected relocation will thence run north $5\frac{1}{2}$ miles to a crossing of the Columbia River in the vicinity of the old Richmond Ferry, thence northeasterly and easterly to intersect with the present Secondary State Highway

No. 11-A west of Connell. The estimated cost of this relocation and reconstruction amounts to the sum of \$939,650.

Either of the above two relocations presuppose that certain rights will be granted by the United States to the State of Washington. In connection with relocation No. 1, it will be necessary for the United States to allow the State of Washington to cross certain lands northeasterly from Yakima now held under lease by the United States and operated as an artillery range.

For the second relocation above-mentioned it will be necessary for the United States by easement or otherwise to permit the State to construct, operate and maintain its highway $2\frac{1}{2}$ miles inside the westerly boundary of the Hanford Project, running northerly from the vicinity east of Cold Creek to the Columbia River.

We have the above-mentioned surveys, relocations and estimates as prepared in detail from examinations made by the engineers in traversing the two above proposed routes. We respectfully suggest that you discuss these matters with Mr. Ramsey and with the U. S. Corps Area Engineer. If you so determine, the writer together with the State highway engineers will be glad to attend any conference wherein settlement of the matter may be fully discussed.

We are assuming of course that you agree with our interpretation of the law as far as compensation may be concerned. This interpretation is to the effect that compensation for the taking of a highway is that amount nec-

essarily to be expended for the relocation and reconstruction of such highway to a grade and standard of the highway taken.

Meanwhile and until we hear further from you we are assuming that our appearance in this case will be preserved and that we will be advised substantially in advance of any trial date to be fixed.

Yours very truly,

ST: gm
HAP

SMITH TROY
Attorney General

cc: Mr. Dinsmore
Mr. Banta
Mr. Kenyon

By: HAROLD A. PEBBLES
Asst. Attorney General

February 26, 1944

Mr. Ivan Merrick, Special Attorney
U. S. Department of Justice
Lands Division
520 Miller Building
Yakima, Washington

Dear Mr. Merrick:

Re: *USA v. State of Washington, Benton County,*
et al. Civil Cause No. 135

We have received no answer to our letter of January 12, 1944, concerning compensation for the taking of Secondary State Highway No. 11-A between Cold Creek and the Columbia River in Benton County, and concerning setting the above case for trial.

It will be sincerely appreciated if you will kindly review this correspondence and let us have your answer to our aforesaid letter at the earliest date possible.

Yours very truly

SMITH TROY

Attorney General

HAROLD A. PEBBLES

Assistant Attorney General

HAP:hec

DEPARTMENT OF JUSTICE

LANDS DIVISION
520 Miller Building
Yakima, Washington

March 25, 1944

REGISTERED

Jerome K. Kuykendall,
Assistant Attorney General,
Olympia, Washington.

Re: *United States of America v. State of Washington et al.*, Hanford Engineer Works Docket No. 135-2 Tract No. 2

Dear Sir:

The above condemnation proceeding was instituted to acquire certain real property necessary for use in connection with the Hanford Engineer Works Project. I am informed that you are the record owner of the above numbered tract.

On March 2, 1944 a declaration of taking was filed in this action, declaring the fee simple title to such land to be taken by the United States. At the same time there was deposited in court \$1.00, the amount estimated by the

Secretary of War to be just compensation for such land. While the estimate is based upon appraisals by competent and qualified real estate men, it is not binding upon either you or the Government. The exact amount payable for the taking of the land will be determined, either by agreement or trial in said proceeding.

However, a portion of the amount deposited is available for distribution, in the discretion of the Court, to those found to be entitled to payment, without regard to whether or not an agreement has yet been reached, and without prejudice to your right to claim a larger amount. Representatives of the Department of Justice will be glad to cooperate with you and with the court in effecting distribution of a portion of the amount deposited. If you will advise me of your desire to have such monies so distributed, I will prepare the papers required for such purposes. It will be necessary, of course, that arrangements be made for the payment out of the deposit of all liens and encumbrances, such as mortgages and taxes against the land.

You will understand that the filing of the declaration of taking and the deposit of estimated just compensation will not interfere with or prevent the reaching of an agreement with you as to the amount to be paid for the taking of your land. If no agreement can be reached, you are, of course, at liberty to assert your claim before the Court in this proceeding.

Yours very truly,

DAN P. McLAUGHLIN
Special Attorney
Department of Justice

DEPARTMENT OF JUSTICE

LANDS DIVISION
520 Miller Building
Yakima, Washington

March 2, 1944

In reply refer to:
Civil No. 135

Honorable Smith Troy
Attorney General
State of Washington
Olympia, Washington

Attention: Mr. Harold A. Pebbles,
Assistant Attorney General

Re: *United States of America v. State of Washington, et al.*, Civil Cause No. 135

Dear Sir:

With reference to your letter of February 26, 1944, please be advised that under date of January 17, 1944, I forwarded to Mr. Norman Fuller, the Project Manager of the Hanford Engineer Works Project, two copies of your letter of January 12, with the suggestion that he forward the same to the Area Engineer.

This office is now in receipt of a letter from Mr. Fuller stating that his office and the Area Engineer will arrange for attendance at a conference at such date as may be agreed upon. I therefore suggest that you indicate the date and place satisfactory to your office and to the State Highway Commission and advise me.

Respectfully yours,

BERNARD H. RAMSEY

Special Assistant to

The Attorney General

BHR:mp

April 3, 1944

Mr. Dan P. McLaughlin
Special Attorney, Department of Justice
Lands Division,
Miller Building
Yakima, Washington

Re: *USA v. State of Washington, et al.* Civil Cause
No. 351-2 (135), Tract No. 2

Dear Sir:

Your letter of March 25, 1944, enclosing copy of Order on Declaration of Taking covering the right of way of Secondary Highway No. 11-A from the right of way line of Chicago, Milwaukee, St. Paul and Pacific Railway to the westerly or right bank of the Columbia River has been referred to the writer for answer.

We are currently writing to Mr. Ramsey relative to arranging a conference regarding the compensation due the state for the taking of the right of way for Secondary State Highway No. 11-A from Cold Creek to Hanford, and we respectfully suggest that the matter of compensation payable to the state in the above case be discussed at that time.

Yours very truly

SMITH TROY
Attorney General

HAROLD A. PEBBLES
Assistant Attorney General

HAP: hec

April 3, 1944

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: *USA v. State of Washington, et al.* Civil Cause
No. 135

Dear Sir:

In reply to your letter of March 2, 1944, regarding a tentative conference for the discussion of compensation to be awarded the state for the taking of Secondary Highway No. 11-A, we suggest that this conference be arranged tentatively for April 21, at which time we shall arrange to have the state highway engineers present.

We ask that you kindly confirm this date at your early convenience.

Yours very truly

SMITH TROY
Attorney General

HAROLD A. PEBBLES
Assistant Attorney General

HAP:hec

DEPARTMENT OF JUSTICE
LANDS DIVISION
520 Miller Building
Yakima, Washington

April 6, 1944

Honorable Smith Troy
Attorney General
State of Washington
Olympia, Washington

Attention: Harold A. Pebbles, Assistant

Sir:

Replying to your letter of April 3, 1944, please be advised that I have contacted the project office of the Army Engineers at Prosser, Washington, and the suggested date of April 21st for conference upon the taking of Secondary Highway No. 11-A is satisfactory to all conferring parties. It is suggested that 2:00 P. M. be set as the time, and the project office at Prosser as the place for such conference. It is believed that by 2:00 P. M. it will be possible for the area engineer and the representatives of the Department of Justice to all be present, and since the records relative to the project boundaries and the record of Secondary Highway No. 11-A are available in the project office but are not available in the Department of Justice offices in Yakima, it is preferable that the conference be held in the project office.

Please advise me whether the place and hour suggested meets with your approval.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
The Attorney General

BHR:jl

April 11, 1944

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: *United States v. State, et al.* Civil Cause No. 135
Secondary Highway No. 11-A
Our File No. 11196

Dear Sir:

This is in confirmation of your letter of April 6, 1944, to the effect that a conference will be held at the Hanford Project office at Prosser, Washington, on April 21, 1944, at the hour of two o'clock p. m., with such conference to be attended by the army engineers, the state highway engineers, yourself and the writer.

Very truly yours,

SMITH TROY
Attorney General

By HAROLD A. PEBBLES
Assistant Attorney General

HAP:rmc

April 29, 1944

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: *United States v. State, et al.* Civil Cause No. 135
Secondary Highway No. 11-A
Our File No. 11196

Dear Sir:

This is the first opportunity which the writer has had to confirm the understanding with which the state officials left the conference held at the project office in Prosser on April 21, 1944. Accordingly this letter is written in order to bring our file and your file up to date and in order that no misunderstanding will arise as to the subsequent procedure.

Mr. Fuller and Major Riley with your concurrence advised us that they, acting through the war department and the United States Army Engineers, would attempt to return the fee to the right of way for secondary highway 11-A by one of two methods. First, by an amendment of the declaration of taking, or second, by a dismissal of the declaration and case so far as the same concerns said highway, by stipulation of the parties. In the event fee is returned to the state, the state would in turn voluntarily acquiesce in the closing of the roadway providing the same is immediately opened after the war and possession is returned to the state in as good or better condition as it was at the time of the taking.

In the alternative and in the event that the fee is not returned the state is to be advised currently of such de-

cision and the case is to remain in status quo for a period of not less than six months and not more than one year from April 21, 1944, during which time the war department is to advise the state as to whether or not we will be allowed to relocate the highway through the westerly portion of the project in accordance with the proposed relocation routes as indicated on the maps exhibited at the conference. In the event relocation is possible you will advise us as soon as such determination is made and we will then confer as to the United States government's compensation to the state for relocation costs. Naturally we are assuming that you will also advise us if and when the possibility of relocation upon the proposed route is denied.

Your confirmation of the above will be appreciated.

Very truly yours,

SMITH TROY

Attorney General

By HAROLD A. PEBBLES

Assistant Attorney General

HAP:rmc

April 10, 1945

Mr. Frank Reed
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: *United States v. State of Washington, et al.*,
Civil Cause No. 135, Secondary State Highway
No. 11-A. Our File No. 11196

Dear Sir:

You will recall that on April 21, 1944, a conference was held in Prosser, Washington, where at such confer-

ence there were present the United States Acquisition Agent, representatives of this office, of your office, of the U. S. Army Engineers, and of the State Highway Department.

At that time and place matters were fully discussed concerning the probable return to the State of Washington of those portions of Secondary State Highway No. 11-A taken by the United States by declaration filed in the above entitled case. There was further discussed at such conference the proposition of payment to the State for that portion of said highway so taken with such payment based upon costs of relocation upon either of two alternative routes with which you are no doubt familiar.

In view of the fact that the U. S. Army Engineers could make no definite commitment as to the return of the said Secondary State Highway to the State of Washington, it was tentatively agreed in such conference to let the matter rest for a period of not less than six months and not to exceed one year, during which time the U. S. Army Engineers and your office was to come to a determination and advise us accordingly as to whether or not the U. S. Government would be willing to return the said Secondary State Highway No. 11-A to the State of Washington within a reasonable time which would in no event be longer than the period ending at the expiration of six months following the close of the war.

Immediately following the aforesaid meeting we wrote to you under date of April 29, 1944, summarizing the situation as of that date.

You doubtless now realize that the year mentioned in the aforesaid conference, and as mentioned in our said

letter of April 29, 1944, has now practically expired and we have received no notification whatsoever from your office concerning a disposition of the matter. You will further realize that the above entitled case was commenced on or about the 23rd of July, 1943, and since such time there has been no attempt made to definitely dispose of the controversy so far as the State's interest is concerned.

We note that recently Col. F. T. Matthias of the U. S. Army Engineers, has made certain public utterances concerning the fact that the Hanford Project is definitely not a post-war project. We quote from an article appearing in the Yakima Daily Republic under date of March 26, 1945:

“ * * * It is entirely a wartime project with no prospect of its being of any commercial value after the war unless some commercial organization could take the buildings and facilities over and put them to some use. * * * ”

A copy of such article is enclosed herewith. A like article appeared in the Yakima Daily Herald under date of March 27, 1945, a copy of which is also enclosed.

If this is the position now taken by the U. S. Army Engineers, we are at a loss to understand why the Government cannot now stipulate that the State may have this Secondary State Highway returned to it at the close of the war.

Naturally, this latter is our primary objective and the State has no desire to seek alternative costs of relocation, excepting as a last resort.

In view of the record, however, it appears to us that we must insist that the matter now finally be disposed of,

otherwise a longer period of further delay may result to the State's detriment.

In view of all the foregoing, we ask that you advise this office on or before the close of this month as to exactly what course the Government intends to pursue, that is, whether or not you are prepared to enter into a stipulation whereby and whereunder the State of Washington will have its highway returned to it at the close of the war, or in the alternative, whether or not you are prepared to offer a money settlement based upon costs of relocation of the highway in question. You will recall that the State has prepared preliminary surveys indicating costs of relocation over two alternative routes. These costs were fully detailed in our letter of January 12, 1944 to your office to the attention of Mr. Ivan Merrick, Special Attorney. The first alternate, running northeasterly from Yakima, crossing the Columbia River at a point south of Beverly, was estimated in the sum of \$2,080,500.00, and the second alternate route, running easterly from Yakima to a point approximately two and one-half miles within the boundary of the present Hanford Project (in Area B) thence northerly across the Columbia River in the vicinity of the old Richmond Ferry, was estimated in the amount of \$989,650.00.

In the event the Government is not disposed to return the highway, we will appreciate your advice as to whether your office and the proper representatives will now be ready and willing to discuss money settlement on the basis of the relocation costs of one or the other alternative routes proposed. If there is no disposition to discuss settlement on that basis, we ask that you now make the

state some offer, otherwise, in the alternative, we ask that this case be set for trial and that we be advised sufficiently in advance of such trial in order that we may proceed with preparation accordingly.

Yours very truly,

SMITH TROY

Attorney General

By: HAROLD A. PEBBLES

Asst. Attorney General

HAP:BL

CC: Mr. Dinsmore
Mr. Kenyon
Hwy. Dept. Files

July 11, 1945

Mr. Frank Reed
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: *United States v. State of Washington, et al.*,
Civil Cause No. 135, Secondary State Highway No.
11-A, Our File No. 11196

Dear Sir:

Upon receipt hereof it will be sincerely appreciated if you will please be referred to our letter of April 10, 1945 and send us an answer to the same at your earliest convenience.

Yours very truly,

SMITH TROY,

Attorney General

By: HAROLD A. PEBBLES

Asst. Attorney General

HAP:BL

September 5, 1945

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: *United States v. State, et al.* Civil Cause No. 135
Secondary Highway No. 11-A Our File No. 11196

Dear Mr. Ramsey:

At the present time the writer has cases set for September 11th, 18th and 25th in eastern Washington. Except for these dates any other time will be agreeable for conference to be held in Portland with you and Mr. Barnes concerning the taking of Secondary State Highway 11-A between Cold Creek to Hanford.

It is respectfully requested that you kindly arrange a date with Mr. Barnes and advise the writer well in advance thereof in order that we may arrange for the attendance of the State Highway Engineers.

Yours very truly,

SMITH TROY,
Attorney General

By: HAROLD A. PEBBLES
Asst. Attorney General

HAP:BL

DEPARTMENT OF JUSTICE

LANDS DIVISION
520 Miller Building
Yakima, Washington

September 7, 1945

In reply refer to:
Docket 135

Mr. Harold A. Pebbles
Assistant Attorney General
Olympia, Washington

Re: *United States of America v. State of Washington, et al.* Secondary Highway No. 11-A Hanford Engineer Works

Dear Mr. Pebbles:

This will advise you that on this date I have written to Mr. E. W. Barnes, Chief of the Portland Sub-Office of the Army Engineers for the purpose of arranging a conference date, and will advise you as soon as I receive a reply to my letter.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
The Attorney General

BHR:ms

DEPARTMENT OF JUSTICE
LANDS DIVISION
520 Miller Building
Yakima, Washington

September 20, 1945

In reply refer to:
Docket No. 135

Mr. Harold A. Pebbles
Assistant Attorney General
Office of the Attorney General
Olympia, Washington

Re: *United States of America v. State of Washington, et al.*, Secondary State Highway No. 11-A

Dear Mr. Pebbles:

This will confirm our prior conversations, and particularly the discussion in the office of the Army Engineers at Portland, Oregon, on September 14 relative to the revesting of title in the State to Highway No. 11-A.

First, let me assure you that the War Department and the Department of Justice are both entirely sympathetic toward the desire of the State to have this highway returned to the State. Both departments are fully advised that the State considers this highway as an indispensable link in the postwar development plans for serving the Columbia Basin area with adequate highways. I assure you that there is no disposition of any government agency to do anything other than cooperate as fully as possible with the State for making possible the completion of these plans.

On the other hand, you will appreciate, in the light of the recent disclosure of the work being done in the Hanford Engineering Works Project, that the Army must

bear in mind the safety factors involved, and indeed I am certain that the State of Washington would not want this highway returned for use by the general public unless and until the Army is convinced that this can safely be done. You will understand that when the Army takes the position that it is impossible to return this road to the State for the use by the general public within the next year or eighteen months that their position is not an arbitrary one but is dictated by the necessity of the situation, and primarily by the safety factors.

I am convinced that if the State of Washington is willing to accept the fact that it will probably be impossible to permit the use of this highway by the general public for a considerable period of time, at a minimum three years after the end of the present emergency, that it will be possible to work out a solution to the problem that will be mutually satisfactory to the Government and to the State of Washington. I am confident, however, that the War Department cannot and will not consider returning the highway to the State for the general use of the public short of the period indicated.

The other matters discussed can, I am sure, be agreed upon if the State is willing to agree to this delay in the return of the highway. I am sure that the War Department would stipulate the dismissal of the present condemnation proceedings for the acquisition of the fee title to the road, and would be willing to amend the proceeding to acquire instead a lease-hold interest coupled with the exclusive possession and use clause for the period agreed upon.

As I understand the position of the State, if this matter can be worked out satisfactorily, the State would be willing to waive any compensation other than the return of the highway with any additions and improvements made by the Government during its period of occupancy.

May I be permitted to express my deep appreciation of the very cooperative attitude shown by the State in this matter, and particularly by your office and by the office of the State Commissioner of Highways. While we have encountered many difficulties in attempting to find a solution in this matter, it has been, and I can assure you will continue to be, a pleasure to work with you in seeking a solution mutually satisfactory to the State and to the Government.

Very truly yours,

BERNARD H. RAMSEY

Special Assistant to
the Attorney General

BHR:mp

ROUGH DRAFT

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

UNITED STATES OF AMERICA,

Petitioner,

vs.

STATE OF WASHINGTON, *et al.*,

Defendants.

Civil Nos. 135 and 136

STIPULATION

* * * * *

IT IS HEREBY STIPULATED by and between the STATE OF WASHINGTON, acting by and through Smith Troy, its attorney general, and Harold A. Pebbles, assistant attorney general, and the petitioner, UNITED STATES

OF AMERICA, acting by and through Bernard H. Ramsey, special assistant to the attorney general of the United States of America, as follows:

I.

That the Declarations of Taking and the Orders on the Declaration of Taking in each of the above entitled causes, in so far as such Declarations and orders affect the fee to the following described real property, are to be, by the above entitled court by application of Petitioner, cancelled and set aside.

That portion of Secondary State Highway No. 11-A, as the same was constituted at the time of filing of the Declarations of Taking hereinbefore referred to, together with appurtenances thereto, the center-line of which highway is described as follows: Beginning at the quarter corner common to Sections 34 and 35, Township 13 North, Range 24 East of the Willamette Meridian, thence northerly along the line between Sections 34 and 35 to the Section corner common to Sections 26, 27, 34 and 35 in said Township and Range, thence easterly along the line between Sections 26 and 35, 25 and 36 in said Township and Range, and easterly along the line between Sections 30 and 31, 29 and 32, 28 and 33, 27 and 34, 26 and 35, 25 and 36 in Township 13 North, Range 25 East of the Willamette Meridian, and easterly along the line between Sections 30 and 31, 29 and 32, 28 and 33, 27 and 34, 26 and 35, 25 and 36, in Township 13 North, Range 26 East of the Willamette Meridian, and easterly along the line between Sections 30 and 31, 29 and 32, 28 and 33, 27 and 34, 26 and 35 in Township 13 North, Range 27 East of the Willamette Meridian, to the corner common to Sections 25, 26, 35 and 36 in said Township and Range, thence northeasterly to the Columbia River at the ferry landing.

II.

That Petitioner in the above entitled causes will file an Amended Declaration of Taking where and whereby Petitioner will seek and have set over unto it only a leasehold interest in the property above described, with such leasehold interest to be effective and in force from the time of the filing of the Amended Declaration to the expiration of three years following the declaration of the end of the present emergency by the Congress of the United States or by the President of the United States: Provided, however, that such term may be for a lesser period as determined by the Secretary of War.

III.

Upon the expiration of said three-year period all control, possession, use and interest in and to the property above described will terminate and such property shall be returned to the State of Washington under the following terms and conditions and with no further rights or interest in the uses therein or thereto:

(a) The Washington State Highway, being Secondary State Highway No. 11-A, is to be by the United States of America returned to the State of Washington at the end of the aforesaid period in a condition equal to that presently existing as to maintenance and construction;

(b) In addition to the highway right of way included within the description above set forth, the United States will, along with the return of said highway to the State of Washington, convey such additional uniform width of right of way as may at the expiration of said period be necessary to then maintain the highway to its

present widths and standards of construction; the foregoing, however, shall not be construed to obligate the United States to include within any such conveyance such turn-out or parking areas as are not within the highway right of way now in use, nor shall the United States be obliged to reimburse the State of Washington in money for any failure to include such turn-out or parking areas;

IV.

If, at the end of the above-mentioned period, or if at any time the United States takes the fee or possession for a period longer than above set out, the State of Washington shall, immediately upon such taking, or upon redemption of possession by the United States after the expiration of the above mentioned period, be paid its costs of relocating a highway to serve relatively the same purpose heretofore served by Secondary State Highway No. 11-A, with such relocation costs to be based upon the then prevailing costs of construction of a highway to the same standard and grade as the highway taken.

V.

All of the foregoing shall be subject to ratification by the legislature of the State of Washington and shall not become binding upon said State until so ratified.

DATED this..... day of....., 1946.

STATE OF WASHINGTON

By.....

SMITH TROY
Attorney General

.....
HAROLD A. PEBBLES
Assistant Attorney General

UNITED STATES OF AMERICA

By.....
BERNARD H. RAMSEY
Special Assistant to the
Attorney General.

January 24, 1946

Honorable Clarence B. Shain
Director of Highways
Olympia, Washington

Attention: Mr. O. R. Dinsmore
Construction Engineer

Re: *Secondary State Highway No. 11-A, U.S.A. v.*
State of Washington, et al., Docket Nos. 135 and
136 Our File No. 11196

Dear Sir:

In furtherance of the telephone conversation which we held last week we are pleased to enclose in rough draft a contemplated stipulation for submission to the United States Government officials.

The stipulation is not in final form to be transmitted from this office, however it represents in substance the writer's remembrance of the tentative propositions agreed upon at the Portland conference.

It is respectfully suggested that you peruse the form and return same to us with your comments. In the event

you desire a conference, we will be happy to accommodate you.

Yours very truly,

SMITH TROY

Attorney General

By: HAROLD A. PEBBLES

Chief Assistant

Attorney General

HAP:BL

Encl.

April 2, 1946

Mr. Bernard H. Ramsey
Special Assistant to
the Attorney General
Department of Justice
Lands Division
520 Miller Building
Yakima, Washington

Re: Civil Docket Nos. 135 & 136
United States of America v. State of Washington
et al., Secondary State Highway No. 11-A
Our File No. 11196

Dear Mr. Ramsey:

Enclosed herewith you will please find rough draft of a Stipulation to be entered into between the State of Washington and the United States of America concerning the taking of the State's Secondary Highway No. 11-A through the Hanford Project. The Stipulation is drawn in rough draft in order that you may make any suggested changes and return the same to us for final approval and drafting.

You will note the description of the highway which we have set forth in paragraph 1, and while the right of way is not so described in your above civil docket numbers, we deemed it more proper to set out the description of the highway only and we have taken that description from the contents of a stipulation which Norman Fuller originally drew for your office for submission to the State.

In the various clauses which we have set out we have attempted to include all of the matters discussed by the United States and the State authorities in the conference which we held in Portland and which you attended.

Please feel free to make any changes or suggestions and let us have your advices as soon as possible.

Yours very truly,

SMITH TROY

Attorney General

By: HAROLD A. PEBBLES

Chief Assistant

Attorney General

HAP:BL
Encl.

WAR DEPARTMENT
OFFICE DIVISION ENGINEER
North Pacific Division
Portland Real Estate Sub-Office
500 Pittock Block
Portland, Oregon

601.1 (Hanford Engineer
Works—State Hwy. 11A)
NPDRO

26 April 1946

Mr. Bernard H. Ramsey
Special Assistant to
The Attorney General
Lands Division
Department of Justice
520 Miller Building
Yakima, Washington

Dear Mr. Ramsey:

Reference is made to your letter of 8 April 1946 inclosing stipulation submitted by the Attorney General's Office of the State of Washington and embodying agreement relative to state highway 11A acquired in connection with the Hanford Engineering Works Project.

The draft as requested has been examined as to contents and in the present form is not acceptable. The suggested changes, to comply with letter from Office Chief of Engineers dated 18 July 1945, in the opinion of this office are as follows:

I

The description of the road which is set forth on page 1 has been checked against project map and the Declaration of Taking heretofore filed and found to correspond.

II

It will not be necessary to amend the Declaration of Taking. The title can be revested by stipulation and leasehold interest retained by the Government.

III

a. Condition equal to that presently existing relates to time stipulation was executed, which was gravel road when possession was taken by the Government. Today it is a four lane highway. Government should only be obligated to return road in as good or better condition as when taken.

b. Because of changed character of road additional right of way to state would be only just and equitable in view of public interest served by road.

IV

Not acceptable. Restoration costs only as and when the Government acquired the present interest of the State in and to the highway under consideration either by negotiation or condemnation is our obligation. The matter of relocating and constructing a substitute facility should the necessity for so doing then exist can at that time be determined and proper arrangements made in such negotiations or condemnation proceedings.

Further objections in that it obligates the Government to the cost of construction of a four lane highway of a standard and grade much superior to the gravelled highway existing at the time of the initial Governmental possession.

Returned herewith is your copy of stipulation presented to this office for consideration. It is thought the stipulation would be acceptable to the War Department with the listed suggested changes in your revised form.

Very truly yours,

ALBERT R. JACKSON
Project Manager Hanford Engineer Works
Real Estate Division

1 Incl.:
No. 1—Stipulation

DEPARTMENT OF JUSTICE
LANDS DIVISION
520 Miller Building
Yakima, Washington

May 16, 1946

The Attorney General
State of Washington
Olympia, Washington

Attention: Mr. Harold Pebbles

Re: *United States of America v. State of Washington, et al., Hanford Engineer Works*

Gentlemen:

I enclose herewith copy of letter from the War Department relative to the stipulation covering Highway No. 11-A. It is suggested that you carefully consider this letter and the suggestions and objections therein set forth, and that you then transmit to me any suggestions you may have in the matter.

It would appear to be useless to prepare a stipulation form until there has been a meeting of minds between the Highway Commissioner's office and the War Department.

As a middleman, I am personally in no position to suggest what changes might be mutually satisfactory to your Highway Commissioner or to the War Department.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

BHR:mp
Enclosure

STATE OF WASHINGTON
SMITH TROY
Attorney General
Olympia

June 7, 1946

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: Civil Docket Nos. 135 & 136 *United States of America v. State of Washington, et al.* Secondary State Highway No. 11-A Hanford Engineering Works Our File No. 11196

Dear Mr. Ramsey:

Needless to say it was with considerable misgivings that the writer and the officials of the Washington State Highway Department read and examined the contents of your letter of May 16th, together with the contents of the carbon copy of the letter dated April 26th from Albert R. Jackson to you. Any misunderstanding as to the substance to be contained in the stipulation has arisen in the office of the United States Army Engineers or in the office

of the manager of the Hanford Project, and not in the office of the State Highway Department or that of the Attorney General of this state.

As a matter of fact, and as you will no doubt recall, the stipulation was prepared from longhand notes which I took at the conference held in Portland in the office of E. W. Barnes, Chief of the Portland Sub-office of the Army Engineers. I remember there were present at such conference, not only you and Mr. Barnes, but representatives of the Army Engineers, the then Hanford Project manager and one or two individuals representing the Department of Justice from the San Francisco office, as well as the undersigned and officials of the Washington State Department of Highways. As point by point was discussed at that conference and conclusions reached and agreed upon by the conferees present, I made notes of such conclusions and agreements, and such, only, have been included in the preferred stipulation which we have sent to you.

As a matter of equity and as the proposition now stands, largely because of attempts on the part of the state officials to cooperate, the state highway involved was taken from and closed to the use of citizens of this state on or about the 1st of February, 1943, and the state has not been compensated for the loss of such use, neither has there been any effort on the part of the Army Engineers, save and except in the conference held on September 14th, last, to place the state in any position whereby it might reasonably expect a return of the highway and compensation for the loss of the use thereof.

Specifically with regard to Mr. Jackson's studied observations, and calling your attention particularly to paragraph designated as II in his letter to you of April 26th, after considerable discussion, it was agreed by all at the conference of September 14th that the declaration of taking should be amended as provided in our proffered stipulation. If there be any doubt about this, please be referred to your letter of September 20th to this office, which letter was written following the conference, where, in the 3rd paragraph from the bottom of your aforesaid letter, on the second page thereof, you stated: "I am sure that the War Department would stipulate the dismissal of the present condemnation proceeding for the acquisition of the fee title to the road, and would be willing to amend the proceeding to acquire instead a leasehold interest coupled with the exclusive possession and use clause for the period agreed upon." In drafting the stipulation we have merely followed the terms agreed upon at the aforesaid conference and your ideas regarding the practicalities and legalities of the situation.

The observations contained in Mr. Jackson's letter under paragraph designated as III, were fully discussed at the aforesaid conference and it was the consensus of opinion of all of the persons present that since the state highway had been taken practically three years prior thereto and the state's citizens deprived of the use thereof, that the state should be in a measure compensated for that taking and loss of use by return of the highway to the state in its then (September 14, 1945) condition, together with such right of way as might be necessary to maintain the same. Furthermore, at such conference, it was felt by

the conferees that the state should not assume any burden which might result from the Federal Government's removal from the entire area and in such removal leaving the present highway in a condition whereby it might be torn up and then be claimed that regardless of that fact the highway would still have been left in a condition equal to that existing on February 1, 1943. It was because of these facts that the parties agreed on September 14, 1945 that the highway be returned to the state in its present condition at the expiration of three years following termination of the present emergency by the President or by Congress; all this aside from the fact that for a three-year period, the termination of which period is entirely unascertainable at this time, the state would remain deprived of the use of the highway.

In his paragraph designated as IV, Mr. Jackson observes that restoration costs, if the Government ultimately retains possession of the road for a longer period or takes the fee thereof, are to be determined as of February 1943, and upon a consideration of relocating and constructing a suitable facility *should the necessity for so doing then exist*.

It was in order to avoid exactly those things mentioned by Mr. Jackson in the aforesaid fourth paragraph that the parties reached the agreement as contained in the proffered stipulation. It should appear extremely unfair to the state, even to Mr. Jackson, for the state to be required to try out a condemnation suit several years from now based (1) on the then necessity for constructing a suitable substitute facility, and (2) based upon the con-

struction costs for such facility, *determined as of February, 1943.*

In the conference it was agreed that the existing highway, or rather the highway taken by the United States, served a particular need for the citizens of the State of Washington and that the taking of not only the highway but also of an entire area through which a similar highway could pass, left only two alternatives to the state for the construction of a substitute facility. If you will kindly be referred to our former letter of January 12, 1944, addressed to Mr. Ivan Merrick, Special Assistant in your office, you will note that the State Highway Department had run two preliminary surveys upon alternate routes, the first of which routes was estimated to cost the sum of \$2,080,500.00, and the second (presupposing the consent of the U. S. Army Engineers that the projected highway could traverse a portion of the closed area of the project at a point approximately 2½ miles within the westerly boundary thereof) at a sum of \$989,650.00.

As you well know, the state has heretofore certainly taken a cooperative attitude with the Army officials relative to the loss of its highway. Certainly that is evidenced by the fact that we have not pressed this matter to its legal conclusion in the courts, and instead we have sought numerous conferences with your office and that of the Army Engineers, seeking settlement on a basis mutually satisfactory and to the end that the United States might be served in its war effort and the citizens of the State of Washington might ultimately be not deprived of their highway and be compensated, at least in a measure, for

the loss of the use thereof. The attitude of Mr. Jackson, the project manager, is surprising and not to say the least, disappointing, particularly when he is apparently instrumental in undoing the work of many competent individuals as well as the work of your office and of this. Under the circumstances it appears that the state has no alternative other than to ask that the condemnation now proceed in a regular course with compensation to be determined by the jury under the rules of law and the cases applicable thereto.

Upon receipt hereof it will be sincerely appreciated if you will kindly advise us as to the status of the calendar in the local Federal Court. We now desire that this case be tried as speedily as possible, however, we anticipate that it will necessitate extended preparation on the part of the state highway engineers. Naturally, most of the summer will be consumed in this and we would therefore desire that the case be tried early during the fall term. We will be grateful for the foregoing information.

Yours very truly,

SMITH TROY

Attorney General

By: HAROLD A. PEBBLES
Chief Assistant Attorney
General

HAP:BL

WAR DEPARTMENT
OFFICE OF THE DIVISION ENGINEER
NORTH PACIFIC DIVISION
500 Pittock Block
Portland 5, Oregon

18 July 1946

Refer to File
No. 601.1 (Hanford Engineer Works
State Highway 11-A) NPDRO

Mr. Smith Troy
Attorney General
State of Washington
Olympia, Washington

ATTENTION: Mr. Harold A. Pebbles

Dear Sir:

This office is in receipt of a copy of letter directed to Mr. Bernard H. Ramsey, Special Assistant to The Attorney General, by your office under date of 7 June 1946.

The objections which this office raised to the stipulation which you submitted to Mr. Ramsey were based on instructions issued by the Office, Chief of Engineers, on 18 July 1945. Inasmuch as the termination of hostilities subsequent to 18 July 1945 may have had some influence upon the plan for the future use of the Hanford Engineer Works Project it is considered advisable to make inquiry to the Office, Chief of Engineers, relative to such matter.

Accordingly, a letter to that effect is being directed to that office and upon receipt of a reply this office will be agreeable to further discussing the matter.

Very truly yours,

DON E. MELDRUM
Division Real Estate Officer

September 23, 1946

Clerk of United States District Court
Eastern District of Washington
Southern Division
Yakima, Washington

Re: Civil Docket Nos. 135 & 136 *United States of America v. State of Washington, et al.* Secondary State Highway 11-A (Hanford Engineering Works) Our File No. 11196

Dear Sir:

The above entitled case has been pending trial in your court for a period of three years, largely as a result of hope upon the part of the attorneys of this office and those of the U. S. Department of Justice, Lands Division, that the matter of compensation for lands taken could be settled on an amicable basis.

All settlement now appears impossible and we desire to arrange with counsel for a date for jury trial. Upon receipt hereof it will be appreciated if you will consult your calendar and advise us as to your next jury term and as to such dates as may be available.

Yours very truly,

SMITH TROY
Attorney General

By: HAROLD A. PEBBLES
Chief Assistant
Attorney General

HAP:BL

cc: Bernard H. Ramsey
Don E. Meldrum

September 23, 1946

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: Civil Docket Nos. 135 & 136 *United States of America v. State of Washington, et al.* Secondary State Highway No. 11-A Hanford Engineering Works Our File No. 11196

Dear Mr. Ramsey:

Subsequent to transmittal of our letter of June 7, 1946 concerning the then status of the above entitled case, we received a letter dated July 18th from Don E. Meldrum, Division Real Estate Officer, copy of which letter you no doubt received. In such letter of July 18th Mr. Meldrum advised that he was currently making inquiry of the United States Army Engineers concerning the attitude of that office regarding execution of the stipulation which some time ago we submitted to you as a result of the conference held in the Portland office of the Lands Division, where, in such conference representatives of all of the interested parties were present.

Since receipt of Mr. Meldrum's aforesaid letter of July 18th, no communication or word of any kind has reached us concerning any proposed disposition of this case. We believe you will agree that the state and its officers and representatives have been patient to a fault in that the state highway was taken and closed well over three years ago.

We have reached the conclusion that there is little if any hope of an amicable settlement and therefore we are

currently writing to the Clerk of the United States District Court concerning the setting of this case for trial in accordance with a copy of our letter herewith transmitted.

Yours very truly,

SMITH TROY

Attorney General

By: HAROLD A. PEBBLES

Chief Assistant Attorney General

HAP:BL

Encl.

cc: Don E. Meldrum
500 Pittock Block
Portland 5, Oregon

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

Office of the Clerk

P. O. Box 1493, Spokane 7

September 30, 1946

Honorable Smith Troy
Attorney General, State of Washington
Temple of Justice
Olympia, Washington

Attention: Mr. Harold A. Pebbles

Re: *USA vs. State of Washington, et al.*, No. 135
(Yakima)

Dear Sir:

The earliest date that now seems available for trial of the above entitled cause would be early in January.

Yours very truly,

ARAM A. LAFRAMBOISE, Clerk

AAL:EC

October 9, 1946

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Department of Justice, Lands Division
520 Miller Building
Yakima, Washington

Re: Civil Docket Nos. 135 & 136 *United States of
America v. State of Washington, et al.* Secondary
State Highway No. 11-A Hanford Engineering
Works Our File No. 11196

Dear Sir:

We have just been advised by the Clerk of the United States District Court, Eastern District of Washington, that the above entitled case may be set for trial before a jury during the month of January, 1947.

We desire to try the case at such time, however, in advance of commencing preparation therefore we would appreciate a conference with you concerning whether or not we will be able to agree on the manner and extent of the proof.

Accordingly, we ask that you advise us whether or not you will be available in Yakima for a conference sometime during the next two weeks.

Yours very truly,

SMITH TROY
Attorney General

By: HAROLD A. PEBBLES
Chief Assistant Attorney General

HAP:BL

DEPARTMENT OF JUSTICE
LANDS DIVISION
512 Miller Building
Yakima, Washington

October 14, 1946

Honorable Smith Troy
Attorney General, State of Washington
Olympia, Washington

Attention: Mr. Harold A. Pebbles
Chief Assistant Attorney General

Dear Sir:

Reference—*United States v. State of Washington, et al.*,
No. 135, Hanford Engineer Works.

Receipt is acknowledged of your letter of October 9, 1946, requesting a conference in Yakima prior to the trial of this proceeding. You are advised that this office is also in receipt of a letter from the Attorney General's office on this matter reading in part as follows:

"For your information, and you may say it to the Attorney General of the State of Washington, the apparent delay in reaching some agreement on behalf of the War Department with the State of Washington is due to the fact that this project may come under the jurisdiction of the Atomic Energy Commission, recently created by Congress, the members of which have not yet been appointed, and their ideas, not yet formulated, may be entirely different from the present views of the War Department. For this reason the Department desires that the road case be continued as long as possible or until such time as suitable action is taken."

I am also in receipt of a letter from the Army Engineers relative to this matter which states that that office had been advised by the Office of the Chief of Engineers that the entire matter would be discussed with the Manhattan District and appropriate instructions would then

be issued. The letter goes on to state that since the highway is interwoven with the future plans of the Hanford Engineer Works Project, a decision of this nature is grave and will require some time. Under these circumstances, I am wondering whether the State of Washington would be willing to await the final clarification of the issue.

It is now apparent that the attitude of the Portland office of the Army Engineers has not been due to any lack of desire on their part to work out the solution, but has been due to the fact that in the present uncertainty as to where the control of this project rests in the immediate future. No doubt the conference with the officials of the Manhattan District will determine whether the control of the Area is to be vested in the Atomic Energy Commission or is to remain in the hands of the War Department.

I am extremely hopeful that when this question is once determined we will be able to work out a satisfactory solution. I would appreciate being advised as early as possible as to whether the State of Washington will insist on the trial of the case during the January term. As you know, there will be a vast amount of work to be taken care of preliminary to the trial itself.

When these matters have been determined, I will, of course, be glad to meet with you at any time in an effort to determine the issues involved in the case itself if it is to go to trial.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

BHR:mp

October 18, 1946

Honorable Clarence B. Shain
Director of Highways
Olympia, Washington

Attention: Mr. O. R. Dinsmore
Construction Engineer

Re: SSH 11-A, Hanford Engineering Works—Civil
Docket Nos. 135 & 136
USA v. State of Washington Our File No. 11196

Dear Sir:

Attached you will find copy of the letter just received from Bernard H. Ramsey, Special Assistant to the Attorney General, concerning the taking of Secondary State Highway No. 11-A by the United States Government, which taking you will recall has often been the subject of conversation between us.

Upon receipt of the attached copy, it is respectfully suggested that you review the same and advise the undersigned as to what position the State should take in the matter.

Yours very truly,

SMITH TROY
Attorney General

By: HAROLD A. PEBBLES
Chief Assistant
Attorney General

HAP:BL
Encl.

November 14, 1946

Mr. Bernard H. Ramsey
Attorney, U. S. Dept. of Justice
Lands Division
Miller Building
Yakima, Washington

Re: SSH 11-A, Hanford Engineering Works—Civil
Docket Nos. 135 & 136
USA v. State of Washington Our File No. 11196

Dear Sir:

We have referred the substance of your letter of October 14, 1946, to the State Highway Officials and those officials have requested that we seek further consultation with you about the disposition of the above case.

You may therefore expect to hear from us within the near future relative to the setting of a time and place for conference in Yakima. Meanwhile, if at any time you are able to journey to Olympia, we will appreciate your advice as to the time and place when we could arrange a conference with you here.

Yours very truly,

SMITH TROY
Attorney General

By: HAROLD A. PEBBLES
Assistant Attorney General

HAP:bn

NOTICE OF SETTING OF TRIAL

UNITED STATES DISTRICT COURT
SOUTHERN DIVISION, EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA

vs.

STATE OF WASHINGTON, et al.,

} No. 135

To B. H. Ramsey, Attorney, Miller Bldg., Yakima, Wash.
Harold A. Pebbles, Chief Asst. to Atty. Gen., Temple
of Justice, Olympia, Wash.

TAKE NOTICE that the above-entitled case has been
set for trial in said Court at Yakima, Washington, on Wed-
nesday, January 15, 1947, at 10:00 A. M.

Dated Dec. 11, 1946

A. A. LAFRAMBOISE, Clerk
By MARIE EALY, Deputy

December 16, 1946

Mr. Bernard H. Ramsey
Special Assistant
U. S. Department of Justice
Lands Division
Miller Building
Yakima, Washington

Dear Mr. Ramsey:

In furtherance of our long distance telephone con-
versation on Saturday, December 14, 1946, for the reason
that it will be practically impossible for parties to pre-
pare the necessary scientific engineering data for presen-
tation at trial on January 15, 1947, (the date now set for
trial of above entitled case) we are enclosing herewith
the original and three copies of a stipulation and the orig-
inal and three copies of an order striking the case from

the coming jury calendar and providing that the same may be later called up for trial upon motion of either of the parties.

Upon receipt of the enclosure, we ask that you kindly present to his honor, Judge Driver, the original stipulation and order. After you have secured the signature of the judge upon the order, kindly forward unto us one of the copies of the order, indicating thereon the date of the court's signature and also send us an executed copy of the stipulation.

We have instructed the Department of Highways to proceed with making preliminary survey of a contemplated route of secondary State Highway 11a skirting the edges of Area B. As we have previously advised you, the highway department, in the making of each survey, will take sufficient topography, elevations, etc., in order to arrive at an estimated cost of construction on the proposed route. As soon as this data has been furnished to us by the highway department, we will immediately communicate with you in order to determine whether or not the parties will then be able to agree upon preparation of further factual data.

Yours very truly,

SMITH TROY

Attorney General

By: HAROLD A. PEBBLES

Assistant Attorney General

HAP:bn
Encls.

DEPARTMENT OF JUSTICE

LANDS DIVISION
512 Miller Building
Yakima, Washington

December 31, 1946

Mr. Harold A. Pebbles
Assistant Attorney General
State of Washington
Olympia, Washington

Re: *United States of America v. State of Washington, et al.*, Hanford Engineer Works

Dear Mr. Pebbles:

Pursuant to your letter of December 16, 1946, I enclose herewith executed copies of the Stipulation and Order entered in the above entitled case on December 23, 1946.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

mp
Encls.

April 12, 1947

Mr. Bernard H. Ramsey
Special Assistant, Lands Division
U. S. Department of Justice
Miller Building
Yakima, Washington

Re: *U.S.A. v. State of Washington* Civil Docket Nos.
135 & 136 SSH 11-A

Dear Mr. Ramsey:

Since leaving the office of the Attorney General, I have been designated as a special assistant for purposes

of handling the above entitled case until the same is in a position to be closed.

We have just been advised by the engineers of the state Highway Department that the state surveys and estimated costs of relocation of the above designated secondary state highway outside of the prohibited area of the Hanford Project will be completed during the latter part of this month or during the first part of next month at the latest.

As soon as the surveys and estimates are completed and in accordance with our last discussion with you, we desire to hold a conference in your office in Yakima in order that we may iron out several matters regarding proof of compensation and damages to the state in the above entitled case.

It will be appreciated therefore if you will kindly hold yourself in readiness for such conference. I will write to you immediately upon being able to ascertain a definite date.

I do not know the status of the district court calendar in Yakima and I will appreciate your advices as to whether we will now be able to set this case for trial during the latter part of May or during the month of June.

I have in mind that as soon as it appears that the Highway Department surveys and estimates will be completed, we should probably note the case for trial calendar in order that an early trial may be secured.

Thank you for your kind attention.

Yours very truly,

PEBBLES AND KUYKENDALL
HAROLD A. PEBBLES

HAP:is

DEPARTMENT OF JUSTICE

LANDS DIVISION
512 Miller Building
Yakima, Washington

April 14, 1947

Pebbles and Kuykendall
Attorneys at Law
Capitol Theatre Building
Olympia, Washington

Attention: Mr. Harold A. Pebbles

Re: *United States of America v. State of Wash-
ington, et al.*, Civil No. 135, Secondary State High-
way No. 11-A

Gentlemen:

Replying to your letter of April 12, 1947, you are advised that I will be very glad to confer with you relative to this matter at such time as your surveys and estimates are completed.

I am uncertain as to the condition of the Court's docket which has to date been badly crowded. However, I assume that a satisfactory trial date can be secured.

Please advise me when you have determined a satisfactory date for our conference.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

BHR:mp

April 16, 1947

Honorable Clarence B. Shain
Director of Highways
Transportation Building
Olympia, Washington

Attention: O. R. Dinsmore, Construction Engineer

Re: *USA v. State of Washington* SSH 11-A

Dear Sir:

In accordance with our letter of April 12, 1947, to Mr. B. H. Ramsey, we have received his answering letter, copy of which you will find enclosed.

Accordingly it will be appreciated if you will kindly advise us when the surveys and estimates are completed in order that we may arrange for the proposed conference.

Yours very truly,

PEBBLES AND KUYKENDALL
HAROLD A. PEBBLES

HAP:is
Encl.

November 26, 1947

Mr. Bernard H. Ramsey
Special Assistant
U. S. Department of Justice
Lands Division
Miller Building
Yakima, Washington

Re: S.S.H.-11A, Hanford Engineering Works—*U. S. A.
v. State of Wash.-Benton County et al.*
U. S. Civil Docket No. 135

Dear Sir:

In accordance with the last paragraph of our letter of December 16, 1946 the Washington State Highway De-

partment has now prepared surveys, taken topography, elevations, cross sections, etc. and has arrived at estimated costs of newly relocating that portion of Secondary State Highway 11-A taken from the state in the above entitled action.

You will recall that pursuant to stipulation between us the above case was stricken from the jury trial calendar the same to be called up and set for jury trial upon motion of either party.

Upon receipt hereof we respectfully request that you advise us as to when a jury will be available for trial of this case and as to dates satisfactory to you.

Meanwhile if you and your engineers and I and engineers representing the state can arrange a conference we may be thereby enabled to agree on many facts or at least upon the method and extent of proof necessary to establish the relocation costs. Please write us upon this.

Yours very truly,

PEBBLES AND KUYKENDALL
Special Assistants to the
Attorney General

HAP:wlp

LANDS DIVISION
512 Miller Building, Yakima, Washington

December 5, 1947

Mr. C. U. Landrum
Special Attorney
Department of Justice
Detroit Lakes, Minnesota

Dear Gus:

I enclose herewith a letter recently received from Pebbles, relative to *United States vs. State of Washington*,

Civil No. 135, Highway 11-A. As you will note, Mr. Pebbles desires to hold a conference in regard to this matter; and further desires to fix a trial date.

Please advise either Mr. Pebbles or me what date will be convenient to you for such a conference.

Best personal regards.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

BHR:mjd
cc:Pebbles
Enclosure

January 7, 1948

Mr. Bernard H. Ramsey
Special Assistant
U. S. Department of Justice
Lands Division
Miller Building
Yakima, Washington

Re: S.S.H.-11A, Hanford Engineering Works—*U. S. A.
vs. State of Wash.-Benton County et al.*
U. S. Civil Docket No. 135

Dear Sir:

In response to our letter of November 26 we have received a copy of your letter of December 5 to Mr. C. U. Landrum, special attorney for the Department of Justice.

At date of this writing we have not received any communication from Mr. Landrum, nor have we heard further from you.

Please be advised that we must have your answer to our aforesaid letter of November 26, 1947 on or before

the end of this month. Otherwise we shall be obliged to apply to the district court for setting of the above case for trial.

Yours very truly,

PEBBLES AND KUYKENDALL
Special Assistants to
the Attorney General

HAP: wlp
cc-O. R. Dinsmore
Construction Engineer
Department of Highways
Transportation Building
Olympia, Wash.

DEPARTMENT OF JUSTICE
LANDS DIVISION
Yakima, Washington

January 12, 1948

Pebbles and Kuykendall
Attorneys at Law
Capitol Theatre Building
Olympia, Washington

Attention Mr. Pebbles:

Re: S.S.H.-11A, Hanford Engineering Works—*U. S. A.
vs. State of Washington-Benton County et al.*
U. S. Civil Docket No. 135

You are advised that I am in receipt of a letter from Mr. C. U. Landrum, Special Attorney Department of Justice, in which he states that he is ready to go to trial on the above designated case at any time convenient to you. He further states that he does not believe that anything worth while can be accomplished by meeting with you and the Highway officials prior to trial.

I do not anticipate that I will participate actively in this case. Due to the press of other trial work I requested the Department to assign this case to another attorney and Mr. Landrum was designated.

I suggest that you secure a trial date on this case and advise as soon as possible in order that I may let Mr. Landrum know in time to make the necessary arrangements to be in Yakima for the trial.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

DEPARTMENT OF JUSTICE
LANDS DIVISION
512 Miller Building, Yakima, Washington

November 29, 1948

Pebbles and Kuykendall
Attorneys at Law
Capitol Theatre Building
Olympia, Washington

Attention: Mr. Harold A. Pebbles

Re: *United States of America v. State of Washington, et al.*

Civil No. 135, Secondary State Highway No. 11-A

Gentlemen:

I am in receipt of a letter from the attorney general's office insisting that this case has been dragging for four and a half years, and that it is imperative as a matter of policy that it be disposed of without further delay. Under these circumstances I propose, if such action is satisfac-

tory to you, to ask that the case be set for the January term of court in Yakima.

I am assuming that you are still handling this case for the State of Washington, but would appreciate being advised as to that matter, and also as to your views in regard to an early trial date.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

BHR:eh

January 26, 1949

Mr. Bernard H. Ramsey, Attorney
U. S. Department of Justice
Lands Division
Miller Building
Yakima, Washington

Re: SSH 11-A, Hanford Engineering Works
Docket Nos. 135 and 136, *United States of America
vs. State of Washington*

Dear Sir:

The undersigned has been presented the file on this case and has been requested to complete the same at the earliest possible date.

We note therein a letter from you addressed to Pebbles and Kuykendall dated November 29, 1948, whereby you asked permission to set the case for the January term of court in Yakima.

In reviewing the file we note that a relocation of said highway has been made by the State, however, certain portions of said relocation are through certain restricted

areas of the Atomic Energy Commission. Therefore, before we can proceed, we must secure the approval of said commission to have the highway located therein. The State Highway officials are meeting with the officials at Richland on February 9 to determine whether that approval can be given. In the event the Atomic Energy Commission refuses to permit the encroachments of said highway in the restricted areas, it will be necessary for the State to run a complete new location of the highway, which will, no doubt, entail a delay until, at least, next Fall. Under the circumstances we have no recourse but await the outcome of the aforesaid conference before proceeding further with this matter.

We hope to be in Yakima sometime next month and would appreciate a conference with you regarding this case.

Yours very truly,

SMITH TROY

Attorney General

By: ELROY F. WIEHL

Assistant Attorney General

ST:LN

EFW

April 27, 1949

Mr. Bernard H. Ramsey, Attorney
U. S. Department of Justice
Lands Division
Miller Building
Yakima, Washington

Re: SSH 11-A, Hanford Engineering Works, Docket
Nos. 135 & 136, *United States of America vs. State
of Washington*

Dear Sir:

We are in receipt of a Notice of Setting for Jury Trial in the above entitled matter. Said Notice sets the trial for Wednesday, May 25, 1949. However, we do not believe that we will be prepared to present our case at that time for the following reasons:

First, you will recall that on January 25 we wrote you stating that it was necessary to secure the approval from the Atomic Energy Commission for certain portions of the relocation of the above highway. Although every effort has been made to obtain this approval, we have not as yet received official approval from said Commission. We have been informed that Chairman Lilienthal of said Commission has given his unofficial approval to the state's relocation, but as yet we have had nothing official on the same.

Secondly, we have an extremely full court calendar for the month of May and are scheduled to have a condemnation case in Grant County on the 24th of May. We believe that said case will be completed on that date, but we dislike having our schedule of court cases run so close together that there may be a conflict.

Therefore, we trust that you will see your way clear to allow us a continuance in this matter until the next term of court, at which time we hope to have full approval for the relocation of the highway and will be ready to try the case.

Trusting to hear from you soon regarding the above, we are

Yours very truly,

SMITH TROY

Attorney General

By: ELROY F. WIEHL

Assistant Attorney General

ST:LN

EFW

DEPARTMENT OF JUSTICE

LANDS DIVISION

512 Miller Building

Yakima, Washington

May 4, 1949

Smith Troy, Attorney General
State House,
Olympia, Washington

Attention: Mr. Elroy F. Wiehl,
Assistant Attorney General

In re: SSH 11-A, Hanford Engineering Works, *Dockets*
#135 and #136 *United States vs. State of Wash-*
ington, and your letter of April 27, 1949

Dear Sir:

I have taken up the contents of your letter with Judge Driver, and he has indicated that he is willing to grant the continuance you request in the above entitled

case. He suggests that you prepare a written Motion for Continuance based upon the grounds set forth in your letter, and I assume that it would be advisable to forward the same to this office for acknowledgment of service.

If you care to do this, I will acknowledge service thereon and forward to the clerk of the District Court at Spokane.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

BHR:eh

May 17, 1949

Mr. Bernard H. Ramsey, Attorney
U. S. Department of Justice
Lands Division
Miller Building
Yakima, Washington

Re: SSH 11-A, Hanford Engineering Works, Dockets
135 and 136, *United States of America vs. State of
Washington*

Dear Sir:

We are enclosing herewith original and copy of Affidavit in Support of Motion for Continuance, Motion for Order of Continuance and Order of Continuance in the above entitled matter.

We would appreciate your acknowledging receipt on the original of the same and then forward them to the Clerk of the Court for filing.

We trust that these papers are in order and wish to thank you for your cooperation in this matter.

Yours very truly,

SMITH TROY

Attorney General

By: ELROY F. WIEHL

Assistant Attorney General

ST:LN

EFW

encls.

UNITED STATES ATOMIC ENERGY COMMISSION

HANFORD OPERATIONS OFFICE

P. O. Box 550

Richland, Washington

September 2, 1949

Mr. W. A. Bugge
Director of Highways
Department of Highways
Transportation Building
Olympia, Washington

Attention: Mr. O. R. Dinsmore
Assistant Director

Dear Mr. Bugge:

We have delayed answer to your letter of August 19, awaiting recommendation from a scientific consultant group which has been reviewing the possibility of a Wahluke access road. The recommendations of this committee have now been received by the Commission, and a decision based on the recommendations has been reached.

It has been determined that there is no objection to construction of a road crossing the Columbia River by ferry at Vernita and proceeding in a northerly direction

to Beverly and thence eastward to Othello. However, due to the possible hazards involved, it is not considered advisable to allow a road to be constructed that would traverse Wahluke Slope in an easterly direction south of the ridge of the Saddle Mountains.

You may be assured that the Commission gave careful consideration to the effect of this decision upon the inhabitants and property owners in the areas surrounding the Hanford Works.

Continuous study and remedial measures are being devoted to safety problems and construction of a direct highway through the "Control Zone" and the matter can be re-examined after a few years.

Sincerely yours,

FRED C. SCHLEMMER
Manager

DEPARTMENT OF JUSTICE

LANDS DIVISION
512 Miller Building
Yakima, Washington

October 27, 1949

The Attorney General
State of Washington,
Olympia, Washington

Re: *United States of America, Petitioner, vs. State of Washington, Defendant*; Civil #135, In the District Court of the United States for the Eastern District of Washington, State Highway 11-A

Sir:

This office is again being urged by the Attorney General of the United States to bring this matter on for trial.

The case has been on the docket of the United States District Court for six years, and it does not appear that further delay in disposing of the matter can be justified. The matter was taken off of the docket the last time it was set until the position of the Atomic Energy Commission with regard to a possible road across the Waluke Slope could be determined. It has now been determined by the Atomic Energy Commission that, for reasons of security and public safety, the road across the Wahluke Slope cannot be approved by the Commission.

I would appreciate being advised by your office as to whether it will be possible to stipulate the fixing of an early trial date in this matter.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

BHR:eh

HEADQUARTERS
2D INFANTRY DIVISION
Fort Lewis, Washington

Department of Highways
Office of District Engineer
P. O. Box 52
Yakima, Washington

ATTN: R. H. Pyle
District Location Engineer

Dear Sir:

Reference is made to your inquiry of November 17th in regard to two routes through the Yakima Firing Range

being considered for a highway route from Yakima to Beverly.

The purpose for which the range is used, namely artillery and tank fire, prohibits the Department of the Army from consenting to any plan for the construction of a highway within the foreseeable future.

Sincerely yours,

B. D. REAMS
Capt. AGD
Asst. Adj. Gen.

1 Incl
Dwg SE-RE-323

November 17, 1949

Major Bell
Post Engineer
Fort Lewis, Washington

Dear Sir:

This department is making a *reconnaissance survey* to determine if there is a feasible location for a direct highway route from Yakima to Beverly. On your drawing number SE-RE-323 I have indicated two routes which have been projected from topographic maps.

If these routes are found to be practical after field inspection we would like to include in our reconnaissance report an expression from you, or other proper authority, regarding the possibility of either route being used as a highway across the Firing Center. It should be understood that this information will be used only in a preliminary report and that the actual location, if any, may not be made for some time.

Any information you may be able to give will be appreciated. Will you please return the attached map with your reply.

Very truly yours,

T. P. DOYLE
District Engineer

By: R. H. PYLE
District Location Engineer

TPD
RHP:bb
attachment

December 7, 1949

Mr. Bernard H. Ramsey
Special Assistant to the Attorney General
Lands Division, 512 Miller Building
Yakima, Washington

Re: *United States of America, Petitioner, vs. State of Washington, Defendant*; Civil # 135, in the District Court of the United States for the Eastern District of Washington, State Highway 11-A

Dear Sir:

This will acknowledge receipt of your letter of October 27th requesting when the above matter can be set up for hearing. As you know, the previous hearing was postponed until we could determine whether we could re-route Secondary State Highway No. 11-A along the Wahluke Slope. The Atomic Energy Commission, through Mr. Fred C. Schlemmer, manager of the Hanford Project, on September 2nd, 1949, notified the State Highway Department that it would be impossible for the state to con-

struct a road along the Wahluke Slope at the present time. He stated that they had no objection to the construction of a road crossing the Columbia River by ferry at Vernita and proceeding in a northerly direction to Beverly and thence eastward to Othello.

He further stated that because of continuous study and remedial measures being devoted to safety problems and construction, it might be possible for this matter to be re-examined after a few years and a highway allowed to traverse the Wahluke Slope. Accordingly, the State Highway Department is now in the process of running a reconnaissance upon the route suggested by Mr. Schlemmer in said letter. Upon the completion of this survey, the state should be ready to bring this matter on for trial. At that time we shall notify you and stipulate the fixing of an early trial date.

Trusting this will be satisfactory to you, we are

Yours very truly,

SMITH TROY

Attorney General

By: ELROY F. WIEHL

Assistant Attorney General

ST:LB

EFW

cc: Mr. Dinsmore

Mr. Doyle

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
OFFICE OF THE CLERK
P. O. Box 1493, Spokane 7

October 17, 1950

Mr. Smith Troy
Attorney General
Temple of Justice
Olympia, Washington

In re: *USA vs. State of Washington, et al.* #135

Dear Sir:

On the representation that Mr. Ramsey is in the hospital and that you have consented that the above cause be vacated, the setting of the above case for Nov. 1, 1950 is vacated.

Please confirm addressing me at Yakima.

Yours very truly,

ARAM A. LaFRAMBOISE, Clerk

AAL:EC

CC to Mr. B. H. Ramsey, Special Assistant to the Attorney General
Lands Division, Department of Justice
Miller Bldg.
Yakima, Washington

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
OFFICE OF THE CLERK
Yakima, Washington

October 19, 1950

Pebbles and Kuykendall
Attorneys at Law
Capitol Theatre Building
Olympia, Washington

Attention: Mr. Pebbles

Re: *USA v. State of Washington, et al.*
No. 135

Dear Sir:

The above entitled cause, which was originally set for trial on November 1, 1950, has been vacated and stricken from the trial calendar due to the fact that Mr. Bernard H. Ramsey, attorney for the government, is ill and unable to appear in court.

You will be notified when the case has been re-set for trial.

Yours very truly,

A. A. LaFRAMBOISE, Clerk
By MARIE EALY, Deputy.

fme

November 27, 1950

Department of Justice
Lands Division
512 Miller Building
Yakima, Washington

Re: *U. S. v. State of Washington*
No. 135 (SSH 11-A)

Gentlemen:

Upon receipt hereof it will be sincerely appreciated if you will kindly inform us as to the condition of Mr. Ramsey and as to whether or not he is now sufficiently recovered so that we may together apply for a new trial date for the trial of the above case.

If Mr. Ramsey is not expected to be able to participate in the trial of this case, please inform us as to who we should get in touch with in order to proceed with the trial setting. Your attention will be sincerely appreciated.

Yours very truly,

SMITH TROY

Attorney General

By: HAROLD A. PEBBLES

Special Asst. Attorney General

HAP:wlp

DEPARTMENT OF JUSTICE
LANDS DIVISION
512 Miller Building, Yakima, Washington

November 29, 1950

Harold A. Pebbles
Special Asst. Attorney General
Capitol Theatre Building
Olympia, Washington

Re: *U. S. v. State of Washington*
No. 135 (SSH 11-A)

Dear Sir:

Reference is made to your letter of November 27th concerning the above-entitled case.

Mr. Ramsey is still in the hospital, and it is not known at this time whether he will participate in the trial of this case. As of this date no arrangement has been completed to turn the matter over to someone else.

As soon as we are able to discuss this matter with Mr. Ramsey we will be glad to inform you.

Very truly yours,

BERNARD H. RAMSEY
Special Assistant to
the Attorney General

eh

February 7, 1951

Department of Justice
Lands Division
512 Miller Building
Yakima, Washington

Re: *U. S. v. State of Washington*
No. 135 (SSH 11-A)

Gentlemen:

Your letter of November 29 informed us that Mr. Ramsey was still in the hospital, and that you would discuss with him the setting of the above case for trial.

We have not heard from you and we are wondering at this time whether or not we will be able to get a trial date soon. Please inform us.

Yours very truly,

HAP:wlp

HAROLD A. PEBBLES

Department of Justice
Lands Division
512 Miller Building
Yakima, Washington

March 27, 1951

Re: *U. S. v. State of Washington*
No. 135 (SSH 11-A)

Gentlemen:

Please be referred to our letter of February 7, 1951, in which we request information as to a trial date on the above case. We would like to get the trial of this matter out of the way and would appreciate hearing from you in the immediate future.

Yours very truly,

wlp

HAROLD A. PEBBLES

Appendix D

APPENDIX "D"

**HIGHWAY DEVELOPMENT
COLUMBIA BASIN JOINT INVESTIGATIONS**

Problem 19

United States Department of the Interior
Bureau of Reclamation, Washington, D. C. 1945

**UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION**

November 1, 1944

Commissioner H. W. Bashore
Bureau of Reclamation
Washington, D. C.

Dear Mr. Bashore: I transmit the final report on Problem No. 19 of the Columbia Basin Joint Investigations and recommend that it be published.

The road net advocated by the problem committee apparently would afford maximum economy, safety, and convenience. Particularly interesting are the proposals concerning tertiary roads.

Sincerely yours,

HARLAN H. BARROWS
Planning Consultant

JOINT INVESTIGATIONS COLUMBIA BASIN PROJECT

This is one of a series of reports on problems studied by participants in the Joint Investigations to plan for the successful development and settlement of the Columbia Basin Project in the State of Washington. Proposals of the report are directed toward development of a road network which would incorporate a maximum degree of safety, service, and economy.

The investigators recommend, first, that the network of State highways proposed by the Washington State Department of Highways be adopted as the plan for new highways in the project area; second, that prior to preparation of the farm plat for any block through or adjacent to which the route of a proposed State highway passes, the Bureau of Reclamation advise the State Department of Highways, the county commissioners of the appropriate county or the county engineer, and that, cooperatively, decision be reached as to the best specific location for the highway or road through the area in question; third, that right-of-way for such locations be reserved in the plats.

The reports on problems of the Columbia Basin Joint Investigations will aid the Bureau of Reclamation greatly in formulating plans and programs for the settlement and operation of the Columbia Basin Project. The Bureau deeply appreciates the assistance rendered by all who participated in the investigations.

The publication of the reports is not intended to indicate, of course, that suggestions and recommendations contained in them necessarily will be approved and carried out by the Bureau.

Similarly, other agencies and organizations that designated representatives to help in the work of the investigations are not bound in any way by the results of that work.

H. W. BASHORE
Commissioner.

September 1, 1945

STATEMENT OF PROBLEM 19

To plan desirable additions to and modifications of the road net in adjustment to the irrigation system, village sites and patterns, farm hamlets (farmstead clusters), and other features, and to prospective transportation needs.

INVESTIGATORS AND ADVISERS^①

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CHRIS LARSEN, *Road Commissioner*, Grant County, Wilson Creek, Wash.

① Fourteen of the 15 members of the committee approved the report. K. C. Miller neither approved nor dissented.

② Burwell Bantz, Director, State Department of Highways, represented the Department after the assignment of Mr. Fritts to the armed forces.

- H. L. BLANTON, *County Engineer*, Franklin County, Pasco, Wash.
- G. S. COOPER, Chicago, Milwaukee, St. Paul & Pacific Railway, Seattle, Wash.
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ACKNOWLEDGMENTS

The opportunity to plan highways and roads for the Columbia Basin awakened the interest of many agencies and individuals.

Statewide interest in the program of investigations for the Columbia Basin led the Washington State Legislature in 1939 to authorize a study by the Department of Highways of the system of State highways needed for the project area. The study was made and a report prepared by C. E. Fritts and Calvin E. Fox of the Highway Planning Division. Their report was submitted to the 1941 State Legislature by James A. Davis, acting director of highways. Following approval of the plan in principle by the Legislature, the report was presented as the State's contribution to Problem 19. That contribution has been incorporated in the report presented here.

The report also deals with county or tertiary roads. Valued assistance in formulating the plans for such roads has been given by the county road commissioners of Grant and Adams Counties, the county engineer of Franklin County, and engineers of the State Department of Highways. Aid also has been provided by participants in the joint investigations concerned with plans for the irrigation system, farm management, settlement patterns, farm hamlets, village sites, and townsites. Important contributors in these respects were H. A. Parker, E. N. Torbert, Marion Clawson, Lloyd Fisher, and Walter Goldschmidt.

The report was prepared by V. M. Throop and E. N. Torbert.

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CONCLUSIONS AND RECOMMENDATIONS

An unusual opportunity exists in the Columbia Basin Project area to develop a road net which incorporates a maximum degree of economy, safety, and service adequacy. The proposals of this report are directed toward those ends, and they promise to yield substantial benefits not only to the settlers and to the counties in which the project lies, but also to the State.

Two main elements of the road net have been recognized—State highways of both primary and secondary grade, and county, or tertiary roads. Routes are proposed for a network of State highways. For tertiary roads, however, the preparation of specific plans must await final conclusions with respect to canal locations, sizes of farm units and other items to which the network of lesser roads should be adjusted. Accordingly, consideration of the tertiary system in the report is limited to the development of principles for use in the road layout, the experimental application of the principles, and the formulation of procedures.

The Columbia Basin Project Act of March 10, 1943, provides a device for establishing the road net found desirable. In conformance with the act, plats of all farm units for each irrigation block will be prepared by the Secretary of the Interior before water is delivered. The farm units will be adjusted in size to land productivity and other considerations, and in shape will be adjusted to topographic conditions, wherever necessary, without regard for section lines. In the plats, reservation will be made for road rights-of-way to assure access to each farm

unit. The conduct of this work by the Bureau of Reclamation, acting for the Secretary, will necessitate close cooperation between it, the State Highway Department, and the county road commissioners.

The proposed network of State highways is presented in figure 1 (page 6) and the accompanying discussion, and need not be reviewed here. The locations there indicated for new State highways are general and tentative. Specific, detailed locations will require further study. It is concluded that the general routes shown not only will serve adequately the needs of the project area, but also will improve materially existing routes of cross-state travel. It is further concluded that construction of new elements of the system, as required, can be financed with current motor vehicle revenues.

It is therefore recommended:

1. That the proposed network of State highways be adopted as the plan for such highways in the project area;
2. That prior to the preparation of the farm plat for any block through or adjacent to which the route of a proposed State highway passes, the Bureau of Reclamation advise the State Department of Highways, and that, cooperatively, decision be reached by them as to the best specific location for the highway through the area in question; and
3. That right-of-way in such locations be reserved in the plats.

In the development of the tertiary road system, economy can be attained in several ways. One way is to

minimize the number of crossings over large canals. A second is to minimize the total road mileage.

A basic means of minimizing road mileage without sacrificing travel convenience is to make the farm units relatively deep and to give them narrow frontages on roads which are parallel, or as nearly parallel as topographic considerations permit. This would make for a maximum number of farmsteads per mile of road, thus minimizing not only the road mileage, but also the mileage and cost of services utilizing or following the roads. Farm units with depths of from two to four times their widths have been recommended by other investigators. Depths in rods to achieve the desired ratios, and the resultant distances between roads each serving two tiers of units, are dependent on farm size, which will vary greatly by class of land. Maximum economy will be attained by adjusting the spacing between these roads, termed principal service roads, in accordance with size of farm by class of land in the manner presented in the report, which will yield farm units of the recommended shapes.

If, as proposed, the maximum practicable number of farms are given frontage on the principal service roads, then the number and the mileage of crossroads may be held to a minimum. Such crossroads would serve only for circulation between different parts of the rural area and without creating significant inconveniences they could be placed at two, and preferably three, mile intervals.

In the interest of convenience, the principal service roads should be oriented towards the towns which will be

the service centers for the farm areas. In the same interest, the use of occasional diagonal roads leading directly to the towns and picking up traffic from the principal service roads will be desirable.

Safety will be promoted by minimizing the number of points of access to State highways. A primary means of achieving access at a limited number of points will be to parallel the State highways at a farm's depth with principal service roads, so that access from farm units bordering State highways will be onto principal service roads rather than main thoroughfares. Safety likewise will be served by avoiding offsets and frequent sharp changes in the alignment of roads.

Application of these principles to a tract of about 50 square miles resulted in an average of only 1.45 miles of tertiary road per square mile of area. The tract selected presents highly favorable conditions for road development along the lines suggested, and the results cannot be accepted as representative of those to be expected for the project as a whole. Nevertheless, the figure of 1.45 miles per square mile is far below the comparable mileage in areas of similar topography where the county road system has developed in the traditional manner along section and half section lines. In parts of the Boise Project investigated the comparable figure ranges from 2 to 3 miles per square mile, and in portions of the Yakima Project it reaches 4 miles per square mile. With estimated road costs of \$2,750 per mile, the prospective savings through adoption of the principles indicated range from \$1,500 to more than \$4,000 of road investment per

square mile. Savings in maintenance and in services utilizing or following the roads should be proportional.

In view of these considerations, it is recommended that the principles noted above and elaborated in the report be applied to the maximum practicable extent in laying out the tertiary road system.

The mutual adjustment of numerous items will be needed in the development of the tertiary road system. The locations of the larger canals, the towns, railroads, State highways, and improved county roads will present fixed lines and points to which the tertiary roads should be adjusted. Considerable adjustment will be possible, however, in the boundaries of most farm units. In establishing units which may be leveled and irrigated with maximum economy, the traditional land survey subdivision lines will not be utilized as farm boundaries in large portions of the project area. Hence, a tentative road layout adjusted to the items noted above will serve, in turn, as a framework for adjustment of the farm units.

It is accordingly recommended that there be prepared a tentative plan for tertiary roads after the locations of principal canals, State highways, towns, and the like have been established, but before the farm unit plat for an irrigation block is prepared. The tentative road plan will serve as a guide in the preparation of the farm unit plat and may be modified, if necessary, to meet requirements imposed by problems of developing farm units of shapes and sizes convenient for irrigation.

The county road commissioners should participate in the layout of the tertiary road system, and their counsel

and approval should be solicited at appropriate stages in the work.

Chapter I

NEED AND OPPORTUNITY FOR PLANNING

It has long been recognized that a maximum degree of economy, safety, and service adequacy could be achieved if the road system for an irrigated area were as carefully planned as the irrigation system. The Columbia Basin presents an unusual opportunity for such planning, which will yield substantial benefits to the State, to the counties in which the project lies, and to the settlers.

Both the State and the counties, or road districts of the counties, build and maintain roads. Primary State highways are largely intended to serve the requirements of traffic between major centers and between intensively developed sections of the State, and to provide connection with the systems of adjoining States. Secondary State highways link the primary routes and interconnect areas and centers of somewhat less intensive development. Within well populated areas, both grades of State highway carry a heavy volume of local traffic. County roads are primarily of local significance. They are designed to carry the differing, but relatively light, volumes of traffic involved in farm-to-town and inter-village movement. Roads of all three types will be required to serve the Columbia Basin Project area.

The project area lies between the two major portions of the State now most heavily populated. The project is about 80 miles long, from north to south, and from 30 to 60 miles wide. Hence, with appropriate planning, many

segments of a State highway network needed to interconnect portions of the project area will also improve connections between adjacent parts of the State. Particularly important in this respect are the opportunities for better connections between the northeastern and southwestern parts of the State and for a better north-south route through the center of the State. Although a number of direct east-west primary routes cross central Washington, northeast-southwest routes, via good paved highways, from the Spokane area to the Yakima Valley and the lower Columbia River area are at present circuitous. The same is true for improved routes from north to south through the center of the State. Both could be improved materially by additional State highways through the project area.

The advance planning of highways in the project area also can be of profit to residents of the State in ways other than through the convenience and economy of more direct cross-state primary routes. Lands of the project area now are largely undeveloped and relatively low in value. By planning routes in advance, and by acquiring needed rights-of-way before high values are added by development, not only can the most desirable routes be secured, but substantial savings can be realized in the costs for right-of-way. With effective planning, moreover, protection can be provided to assure that the primary highways remain the safe, attractive routes of heavy, fast traffic for which they are intended, and for which local residents as well as cross-state travelers will have need.

Without careful planning, the mileage of county roads developed over a period of years to serve an irrigated area tends to become needlessly great. This has been unavoidable in many instances, because the shapes and sizes of farm units, rather rigidly adjusted to the boundaries of legal sections and their subdivisions, have necessitated numerous roads to provide access to each property. Moreover, the orientation of the roads thus developed has not always been the most advantageous which could have been arranged.

The problem was not acute in the past when unimproved roads of comparatively low cost adequately served the needs of horsedrawn vehicles. With increasing need for improved, hard surface roads to meet the demands of automobiles and trucks, however, the expense of constructing and maintaining an adequate system of county roads has tended to place an increasingly larger tax burden on county residents.

Settlers in the Columbia Basin Project will be faced with numerous heavy expenses and will require every possible saving in outlay to help insure their success. Studies presented subsequently indicate that the use of entirely workable plans for farm and road layouts will permit the establishment of county road systems in the Columbia Basin with total road mileage of from 50 to 75 percent of that in the Boise Project area, and of only 40 percent of the mileage prevailing in portions of the Yakima Valley. In addition to the savings in taxes, residents of the project area would be greatly benefited by the safety and convenience of a county road system care-

fully planned in relation to trade centers and the State highway system.

The general lack of a well developed road system in the Columbia Basin presents an unusual opportunity to achieve these several benefits. Means for assisting in their achievement are provided by the Columbia Basin Project Act of March 10, 1943.

In conformance with the act, plats of all farm units in each irrigation block will be prepared before water is delivered. The sizes of the units will be those found necessary for the support of a farm family. In shape, the units will be adjusted wherever necessary to topographic conditions, without regard for section lines, so that the most efficient units will be established from the standpoint of irrigation and other farm operations. In connection with the farm plats, reservations can be indicated for roads rights-of-way to assure access to each unit. Hence, the act provides the means for carrying into effect the major features of a planned system of State and county roads.

The purposes of this report, therefore, become: (1) To design, in as much detail as practicable, a road system for the project area which will achieve the desired ends; and (2) to indicate subsequent steps needed to carry plans into effect by the means which the farm plats provide.

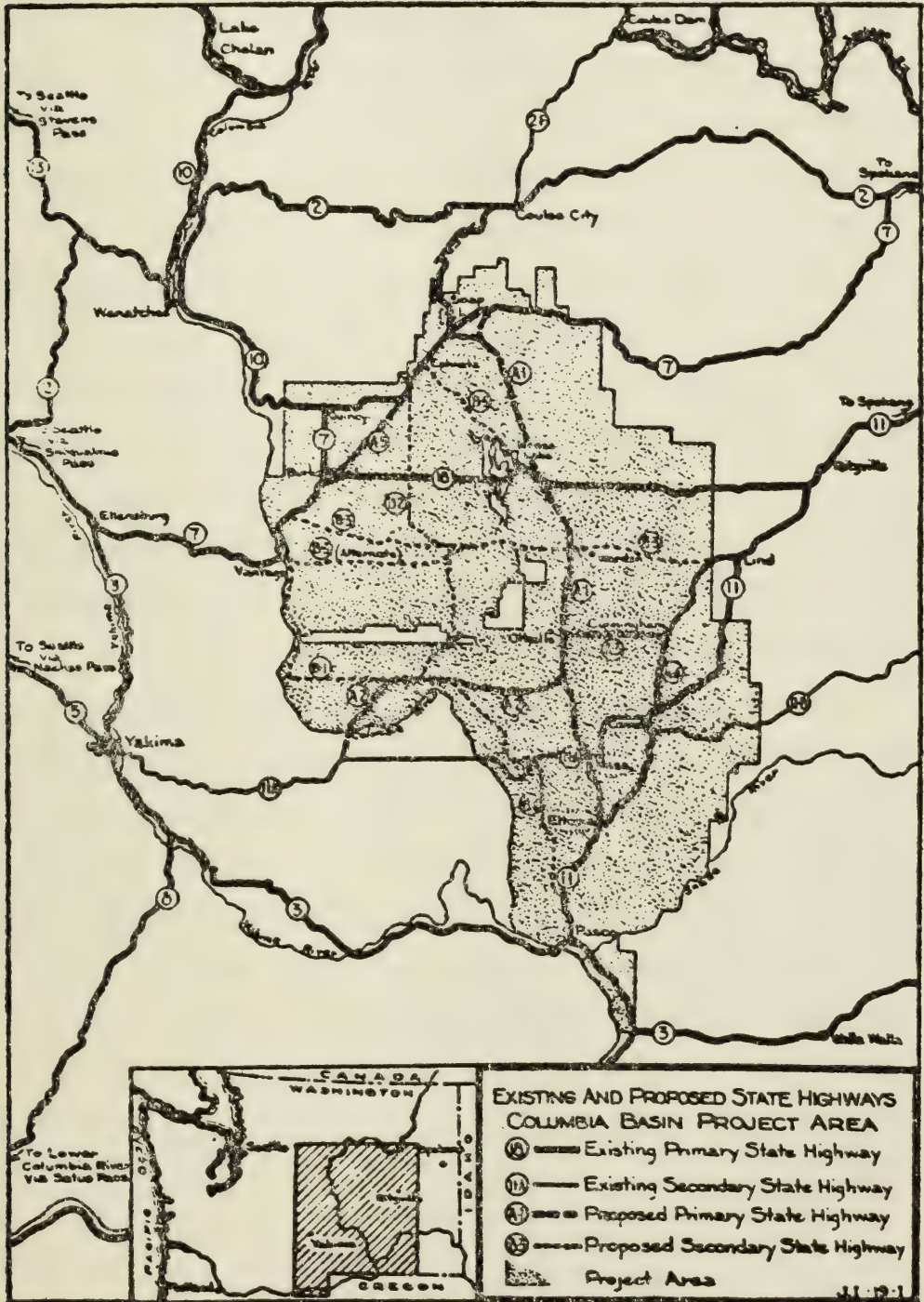


FIGURE 1

General Character of the System^①

Existing and proposed State highways, which together constitute the recommended State highway system for the project area, are presented in figure 1.^② The indicated routes for new highways are tentative. Their final location will depend on detailed surveys and settlement plans not now available. The general outlines of the proposed system, however, are well defined.

In broad outline, the system forms a gridiron pattern composed of north-south and east-west routes spaced from 10 to 15 miles apart. It is apparent that some of the highways will serve admirably to provide shorter cross-state routes, through connections with other State highways beyond the borders of the project. As a whole, the system will clearly afford convenient circulation from one part of the project to another.

The five existing State highways in the project area are parts of cross-state routes. Most important in east-west travel across the central part of the State are the two primary State highways 7 and 18. From the west, the former enters the project upstream from the bridge over the Columbia River at Vantage, runs north to Quincy and thence eastward along the northern edge of the irrigable area through Ephrata and Soap Lake to Spokane.

① The materials in this chapter, including the proposals for State highways, are taken from: *A Report of the Director of Highways Based Upon a Survey, Investigation and Reconnaissance Concerning Present and Future Requirements for the Establishment of Public Highways Serving Areas Which May Be Reclaimed Through the Operation of Grand Coulee Dam*. The report was prepared at request of the State Legislature, and submitted by James A. Davis, acting director, Department of Highways, on April 1, 1941, to Investigators of Problem 19, Columbia Basin Joint Investigations, as a partial answer to that problem.

② The proposed system is presented in small scale in figure 1.

At Quincy, Primary State Highway 7 is joined by Primary State Highway 10, from the Wenatchee Valley. From a junction with Primary State Highway 7 about 10 miles south of Quincy, Primary State Highway 18 leads eastward through Moses Lake to the Spokane area. Another east-west route of secondary grade (Secondary State Highway 11-A and 11-B) running between Yakima and Colfax, traverses the south central part of the project. The fifth existing highway of primary grade (Primary State Highway 11) crosses the southeastern part of the project area and affords connections between the southwestern and northeastern portions of the State.

Of the 10 additional State highways proposed, 5 are of primary and 5 of secondary grade. Three of the primary highways, following routes designated as A-1 to A-3 in figure 1, will be parts of additional cross-state routes. The other two—A-4 and A-5—involve realignment or extension of established highways. Route A-1 will be followed by a new highway running north-south from Soap Lake to Pasco. Routes A-2 and A-3 in combination will provide a much more direct east-west route than now exists between the Spokane area and the middle Yakima Valley, and thence to the Puget Sound area via Naches Pass or to the lower Columbia River area via Satus Pass. Route A-4 is proposed chiefly as an improved alignment for a part of Primary State Highway 11, and route A-5 will shorten the present distance across the project area via Primary State Highway 7. The five secondary highways, following routes designated as B-1 to B-5, are designed as links between the primary highways

and to serve and interconnect the main bodies of irrigable land.

The total length of the proposed system for the project area is 693 miles, 462 miles of which are of primary grade, and 231 of secondary. Existing highways make up nearly half of the total (329 miles), and more than half of the mileage of primary highways (292). Additions, then, will involve the construction of 170 miles of primary highway and 194 miles of secondary highway.

Justification for construction of this system lies in the fact that its daily average use is expected to total 1,207,550 vehicle miles. This is equivalent to 1,598 vehicles per day over the entire system. These estimates suggest that the highways in the Columbia Basin will be much more heavily traveled than those in Yakima County, where 766 vehicles per day were found to pass over primary State highways in 1936, and 320 over secondary State highways.

Determination of the number and location of the new highways involved four broad considerations: (1) The integration of the highways with the existing State network; (2) the character and requirements of the several portions of the project area; (3) sound standards of highway engineering; and (4) financial requirements and limitations. The first has been briefly indicated and the others are discussed below.

New Routes in Detail

The importance of local requirements and local use of State highways under conditions similar to those anticipated in the Columbia Basin was revealed by a survey

of highway use in the Yakima Valley.^⑨ Findings of that survey indicate the need for adjusting State routes to serve local traffic. The survey also provided data used in estimating prospective highway traffic in the Columbia Basin.

The significance of local traffic is apparent in the fact that 75 percent of the State highway users in the Yakima Valley, on a typical day, reported trips involving no more than 8 miles of travel, one way (table 1). Only 2 percent made trips of one-way length in excess of 50 miles. For all highway users, 74 percent of travel through rural areas was over State highways. Hence, local traffic accounted for a very large proportion of the movement over State highways.

⑨ The work in the Yakima Valley was a part of a Statewide highway planning survey undertaken in 1936 by the State Department of Highways in cooperation with the U. S. Public Roads Administration.

**Table 1.—Yakima County interviews concerning
road use (all vehicles)**

| One-way trip length | Percent | Accumula- tive ^① percent | One-way trip-length | Percent | Accumula- tive ^① percent |
|------------------------|---------|---|------------------------|---------|---|
| 1 | 11.65 | 11.65 | 27 | 0.03 | 95.13 |
| 2 | 15.40 | 27.05 | 28 | 0.12 | 95.25 |
| 3 | 14.71 | 41.76 | 29 | 0.05 | 95.30 |
| 4 | 11.80 | 53.56 | 30 | 0.37 | 95.67 |
| 5 | 9.96 | 63.52 | 31 | 0.03 | 95.70 |
| 6 | 3.45 | 66.97 | 32 | 0.11 | 95.81 |
| 7 | 4.68 | 71.65 | 33 | 0.11 | 95.92 |
| 8 | 3.59 | 75.24 | 34 | 0.13 | 96.05 |
| 9 | 2.48 | 77.72 | 35 | 0.16 | 96.21 |
| 10 | 3.70 | 81.42 | 36 | 0.44 | 96.65 |
| 11 | 0.89 | 82.31 | 37 | 0.17 | 96.82 |
| 12 | 2.90 | 85.21 | 38 | 0.11 | 96.93 |
| 13 | 0.52 | 85.73 | 39 | 0.04 | 96.97 |
| 14 | 1.46 | 87.19 | 40 | 0.23 | 97.20 |
| 15 | 2.01 | 89.20 | 41 | 0.07 | 97.27 |
| 16 | 1.29 | 90.49 | 42 | 0.04 | 97.31 |
| 17 | 0.40 | 90.89 | 43 | 0.12 | 97.43 |
| 18 | 0.82 | 91.71 | 44 | 0.11 | 97.54 |
| 19 | 0.23 | 91.94 | 45 | 0.07 | 97.61 |
| 20 | 1.15 | 93.09 | 46 | 0.04 | 97.65 |
| 21 | 0.26 | 93.35 | 47 | 0.02 | 97.67 |
| 22 | 0.15 | 93.50 | 48 | 0.03 | 97.70 |
| 23 | 0.44 | 93.94 | 49 | 0.02 | 97.72 |
| 24 | 0.30 | 94.24 | 50 | 0.24 | 97.96 |
| 25 | 0.62 | 94.86 | 50-100 | 0.73 | 98.69 |
| 26 | 0.24 | 95.10 | 100-200 | 0.95 | 99.64 |
| | | | 200-300 | 0.36 | 100.00 |

^① Percentages by trip length.

Forecasts have been made of the traffic which will pass over the proposed system when the Columbia Basin Project is fully developed. The local, rural traffic was estimated with the use of the prospective number of farm families tributary to each route, in combination with the expectable ratio of vehicles per family, the average number of trips, and their average length. The estimated number of families was based on the assumptions that there would be one family per farm and that the average size of farm would be 40 acres.^④ It was also assumed that special conditions in the Basin promise to encourage a somewhat greater amount of travel than prevails in the Yakima Valley, and consequently that the one-way trip of the farmer in the Basin is more likely to average 10 miles than 8 miles as in the Yakima Valley. To figures for local, rural traffic obtained by use of these assumptions were added estimates of traffic contributed by local urban populations and by people living beyond the limits of the project area. The bases for the latter were available from traffic counts for highways in comparable areas and for current travel over existing highways in and bordering the project area.

Primary Routes

Route A-1, a primary element in the plan, will add to the cross-state highway system a route extending north

^④ As a result of the early use of this estimate, before studies of desirable farm size had been advanced, the estimates of prospective traffic are probably somewhat high. The probable sizes of farm units will average about 50 acres on class 1 land, 80 acres on class 2 land, and 100 or more acres on class 3 land, and the average for the project will be close to 60 acres. This average size of about 60 acres, however, is only for full-time farms. Its use alone in the estimates would leave out of consideration the residents of part-time farms, of which considerable numbers are to be expected. Moreover, rural farm traffic is only a part of the total included in the estimates.

and south through the project area. It will run from Primary State Highway 11 near Eltopia, 15 miles north of Pasco, to Primary State Highway 7 near Soap Lake. Throughout its 74.6-mile course the new highway will closely parallel or pass through large bodies of high quality land. These lands, it is expected, will support 8 to 10 farm families, or 32-40 people per square mile, a rather high density of farm population. With short extensions the route also will serve to connect the six villages of Adrian, Soap Lake, Moses Lake, Warden, Othello and Mesa. The combined population of these places when the project is fully developed probably will equal and may exceed the rural farm population served by the highway. Hence, there will be considerable local traffic over the highway originating in towns as well as on farms.

The estimates of traffic volume differ from section to section of the proposed route, and from season to season, but on the whole the volume promises to be great. The average maximum number of vehicles expected on the highway daily is 3,200 and the minimum, 1,800. The average number daily for all seasons and sections is estimated at 2,010 vehicles. Total vehicle miles per day probably will average 150,000.

Although these estimates of traffic and others presented subsequently are somewhat high, in that, as noted above, the early estimate for number of farm families which was used is greater than that now in prospect, this fact does not greatly impair the utility of the traffic data. They indicate the relative amounts of traffic to be expected on different parts of the system and provide a relative index to the gasoline tax revenues that can be fairly

allocated for the construction, maintenance and depreciation of parts of the system. When viewed in comparison with the much lower use of State highways in the Yakima Valley, the estimates appear to justify amply the proposed system in the Basin.

The importance of routes A-2 and A-3 as part of an improved route between the northeastern and southwestern parts of the State has been noted. These two routes, together, traverse the project area from the Columbia River on the southwest, at a point just below Priest Rapids, to Othello and Cunningham on the east. For the greater part of the way, the routes pass through lands of the best class, on which it is expected there will be about 10 farm families per square mile. Route A-3 will provide good connections between the towns of Othello and Cunningham, and route A-2 will serve towns expected to develop on the Wahluke Slope. The latter route involves a much needed highway bridge across the Columbia River, which will permit more direct connections than are now available with the Yakima Valley and major coastal points west and southwest of it.

Estimates of average traffic volume over routes A-2 and A-3 are quite similar, but the estimated range in volume differs considerably. On A-2, the maximum traffic is expected to be about 3,400 vehicles per day and the minimum 1,808; whereas the comparable figures for A-3 are, respectively, 2,240 and 1,700 vehicles. The average daily number is estimated at 1,974 vehicles for A-2, however, and at 1,810, only 164 less, for A-3. Average total vehicle miles per day are estimated at 75,000 for A-2 and 28,000 for A-3. The prospective traffic on both routes

(averaging 1,974 and 1,810 vehicles, respectively) substantially exceeds the average of 1,050 vehicles per day found on primary State highways in the Yakima Valley.

Route A-4, proposed chiefly as a relocation and improvement of P. S. H. 11, extends from Connell northward through the villages of Hatton and Cunningham to Lind. The local significance of the route lies in the fact that it will connect three project area towns and serve a considerable area of class 1 land where high population densities (up to 10 farm families per square mile) are to be expected. The new route also is an improvement over that of P. S. H. 11 in that grades are reduced between Connell and Lind.

Since the new route is a part of P. S. H. 11, running from Pasco to Spokane, it is expected to carry a heavy volume of traffic. Estimates of daily movement range from 3,000 to 2,000 vehicles. Total vehicle miles per day are estimated to be 73,600. The average traffic would be 2,830 vehicles per day—more than twice the 1936 volume passing over primary highway in Yakima County.

Route A-5 is designed to shorten the route now followed by P. S. H. 7 from its junction with P. S. H. 18 near Burke to Ephrata, county seat of Grant County. For the most part, this cut-off traverses project lands of the poorest class, which are recommended for development as irrigated community pastures or for delayed development. In consequence, population tributary to it will be inconsiderable and the traffic rather light. The total daily vehicle mileage on the route is estimated at 18,100 and the average daily number of vehicles at 1,200.

These proposed primary highways, it should be apparent from the foregoing discussion, are of statewide significance. They provide either additions to or improvements of the principal arteries. In contrast, the secondary routes are chiefly of local significance.

DEPARTMENT OF HIGHWAYS

JAS. A. DAVIS, *Acting Director*
Transportation Building, Olympia

April 1, 1941

To: Investigators of Problem No. 19, Columbia Basin
Joint Investigations

From: Jas. A. Davis, Acting Director, Department of
Highways

Subject: Report on Proposed State Highway System for
the Columbia Basin Project Area

Problem No. 19, of the Columbia Basin Joint Investigations reads as follows: To plan desirable additions to and modifications of the road net in adjustment to the irrigation system, village sites and patterns, farm hamlets, and other features, and to prospective transportation needs.

This report is presented, not as an answer to Problem No. 19, but as a contribution to the study of that problem. The report has been prepared at the request of the State Legislature; it is presented here in essentially the form prepared for purposes of the legislature.

For purposes of this report to the legislature, it was necessary to make numerous assumptions, set forth in the report, which were based upon the best information available at the time. It is recognized that material developed

in the course of the Joint Investigations since preparation of the report, and additional information shortly to be made available, may make desirable some modifications of the proposed network.

The report presents only a proposed framework of primary and secondary state highways. For the purposes of Problem No. 19, it will be necessary, not only to consider carefully this major framework in the light of all relevant materials developed in the Joint Investigations, but also to consider the supplementary system of lesser roads.

Very truly yours,

JAS. A. DAVIS

Acting Director of Highways

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CSF

Enc.

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A REPORT OF THE DIRECTOR OF HIGHWAYS
BASED UPON A SURVEY, INVESTIGATION AND
RECONNAISSANCE CONCERNING PRESENT AND
FUTURE REQUIREMENTS FOR THE ESTABLISH-
MENT OF PUBLIC HIGHWAYS SERVING AREAS
WHICH MAY BE RECLAIMED THROUGH THE OPER-
ATION OF GRAND COULEE DAM.

SUMMARY OF CONCLUSIONS

The following general conclusions are presented at the beginning of this report so that the principal items of immediate concern may be readily ascertained:

1. Inasmuch as water will not be available for irrigation before 1944, it will undoubtedly be several years before it will be necessary to construct any new roads in the area. The existing highways are adequate for present needs and so far as circumstances are predictable for several years in the future.
2. The department should be authorized to continue to cooperate in the studies being made by the many agencies concerned with the various aspects of development of the area. This is important in order that the highway plan may be coordinated with plans for development of cities, recreational areas, industrial sites, irrigation canals, rural population development, railroads and all other factors having a direct influence on the location and design of highways.
3. The studies indicate that the state highway system within the area will be eventually self-supporting from motor vehicle revenues if built only as their construction is required by actual settlement of the area. In

other words, it would be impossible with present revenues to construct the entire system in a period of two or three years; otherwise all other state highway improvement within the state would be at a standstill. If the development of the highway system is coordinated with the rural population development in the area, then the system can probably be constructed in stages so that too great a burden will not be imposed in any biennial period.

4. Studies indicate that it will be impossible for the county road or land service system of feeder roads to be constructed with existing county revenues. It is our opinion that proper provision should be made in the development of the area for Federal assistance in the development of the feeder roads or that property pay its proper share of the cost of construction of the county road system.
5. As plans for the development of the area become more definite, it is advisable that provision be made for rights of way for highway purposes and made available for improvement before cost of the land causes the cost of right of way to become prohibitive.

METHOD OF APPROACH IN SELECTION AND DETERMINATION OF REQUIRED HIGHWAY SYSTEM

Introduction:

In approaching the study of the probable highway requirements of the area, it was necessary to take into account all of the plans thus far developed by the Federal agencies for the ultimate development of the area. It was essential that a system be considered that would serve the completed project and at the same time provide roads that could be developed as the several areas within the reclamation project are placed under water. It is difficult to arrive at precise final conclusions since there are many factors influencing highway use and necessity yet to be determined by related studies. These studies at the present time are being conducted by various committees under the direction of a Federal coordinator, and as the results of these studies become available, adjustments in the suggested highway plan must necessarily be made.

All data now available concerning those factors which influence travel have been procured. Consideration has been given to the potential rural population and its distribution, probable community centers, industrial sites, rail and water connections, recreational areas, tourist travel and other pertinent factors. After consideration of the best available data concerning all of the foregoing, a tentative system of primary and secondary highways to serve the projected development has been selected. The detailed location of feeder and land service roads cannot be made until a final plan for the development of the farm units has been made by other agencies.

Method Followed in Estimating Total Highway Travel:

The general approach to the location and service to be rendered by the highway system was as follows: From the Bureau of Reclamation we obtained the location of the areas classified as suitable for cultivation. We also obtained the estimate of the number of farm units to be established in each area by determining the number of acres that would be irrigated and the allocation of acreage to each farm unit. From the number of farm units we were then able to determine from studies of other areas the probable number of vehicles that would be owned and operated by the rural population within the area. By comparing the amount of traffic developed by urban population as related to rural population, we were then able to combine the potential rural travel with potential urban travel and arrive at probable estimates of the ultimate use of the projected highway system. We were not able to locate new cities specifically, but by studies of other areas we were able to determine within reasonable limits the probable location of cities and community trade centers. While we did not specify any exact location of towns, it is believed that a projected highway net can easily be adjusted to serve the towns that undoubtedly will be created within the area.

Size and Number of Farms:

It is estimated that 1,200,000 acres of land will be irrigated. This information has been obtained from the Bureau of Reclamation and is based upon adequate studies of land use. It is anticipated that farm units will average 40 acres in size, including suburban development. While

the units may vary somewhat in size due to topography, and while they may vary in size also because of the probability of establishing smaller units for part-time farming use near projected towns, the average figure of 40 acres is considered adequate for determination of potential travel.

Rural Travel Habits:

During the preceding four years the department has been cooperating with the Public Roads Administration in an extensive Highway Planning Survey conducted for the purpose of procuring for the first time factual information concerning the use of highways. From those studies we have been able to determine many items of value in estimating the potential traffic needs of the Columbia Basin area. By comparison with data obtained from similar areas, we have found that one vehicle will be owned for each farm unit within the area. We have found that average rural population will be 3.7 persons per farm unit. We have also found that in similar areas the urban population will be one and one half times the farm population. Our road use surveys of similar areas indicate that the average one-way trip of the farm vehicle is 7 miles and that the farm vehicle owner makes two such trips each day.

Using this basic information as a guide and having knowledge of the per cent of travel over the state highway system, county road system and city streets by both rural and urban population, we are able to arrive at the total amount of travel to be generated within the area. By having the location of the farm units and the probable

location of cities and community centers as determined by travel habits, we were then able to project a system of primary and secondary highways and to determine the amount of travel on each of the routes.

While the average one-way trip length of rural population in similar irrigated areas is now 7 miles, it is anticipated that because the opportunity is afforded for a complete planning of city locations to serve the rural areas that the average trip length may be increased to 10 miles, and we have used that figure as the basis of potential travel. Well-placed cities will undoubtedly be located to provide the required service to rural development, and at the same time, the number of cities may be less than in existing irrigated sections so that average travel will slightly increase.

Estimates of Travel by Road Systems:

Beginning with the knowledge of the number of rural residents in each area to be irrigated and having knowledge of the travel characteristics, we were able to develop probable traffic estimates on each of the routes selected. The routes selected were chosen so as to serve best the several districts or blocks of area to be placed under irrigation. The exact location of the routes of course had to be determined by topographic conditions affecting the location and design of the highway in order to procure the highest degree of service at the lowest construction cost.

Our surveys indicate that rural residents perform 82 per cent of their travel on rural highways and 18 per cent on city streets. Urban motor vehicle owners travel 45 per

cent on the rural highway system and 55 per cent on city streets.

As a check on the estimated amount of travel within the Columbia Basin area, we have compared our estimates of travel with that existing within the state as a whole. We find that 74 per cent of the total rural highway travel within the area will be over the projected state system. The remainder, or 26 per cent of the travel, will be on the feeder or county road system. Throughout the state as a whole on the existing highway system, we find that 76 per cent of all rural highway travel is on the state primary and secondary highway system and 24 per cent is on the county road system.

The amount of through and tourist travel has been estimated using as a basis the known volumes of tourist travel, also the known volumes of long distance travel by Washington residents. In the attached tables will be found a tabulation showing average trip lengths and the percentage of travel accomplished in the various trip lengths. For instance, it is interesting to note that 90 per cent of all one-way trips in Yakima County are less than 16 miles. This figure is comparable to all other studies within the state as a whole and compares with the studies of other states, indicating that a much higher percentage of travel over the rural highway system is accomplished by local residents traveling relatively short distances than would be generally anticipated.

Engineering Problems Involved:

A thorough investigation of the engineering aspects of each route was made. This investigation consisted of a

reconnaissance report on each route to determine the approximate desirable location and to provide routes that would best serve the traffic needs at the lowest possible cost. Estimates of cost were prepared from the reconnaissance surveys and the standards of design contemplated are considered to be adequate to serve the ultimate traffic requirement of the area. Descriptions and discussions with estimates of cost of each of the selected routes are included in the report. Included also are maps showing the tentative selection of a system, as well as the potential traffic to be carried by the system.

FINANCIAL CONSIDERATIONS OF THE PROPOSED SYSTEM

State Highway System:

The selected state highway system consists of 364 miles of new highways and 329 miles of the existing system. It is estimated that the projected highway system including the improvements necessary on existing routes will cost approximately \$10,344,000. If traffic volumes develop to the extent contemplated in the ultimate development, the projected state system, including existing routes, will eventually earn annually \$1,850,000 in motor vehicle user revenues. It would indicate that such a system will be entirely solvent and can be constructed and maintained with revenues earned by the system. However, it can be readily seen that the development of the system will have to be spread over a period of years; otherwise it could not be financed with state revenues now available for construction purposes. The existing highway net will adequately serve all traffic demands until

such time as the reclamation project has developed to the point of settlement by rural population, and until that time there will be no necessity for investment of highway funds within the area.

County Road System:

It is estimated that approximately 7,175 miles of county roads will be necessary to serve land development and as feeder roads to the state system. It is estimated that this cost will amount to approximately \$19,780,000. The annual earnings from motor vehicle revenues will amount to approximately \$596,550. If the county road system were completed, it would represent an annual cost for construction and maintenance of \$1,500,000 spread over a period of 30 years, and with anticipated revenues of \$596,550 it is plainly evident that serious consideration will have to be given to the matter of financing county roads through property taxation or Federal assistance. The county road system necessarily serves a much higher degree of benefit to the rural, social and economic development than the state system, including benefits to land development, schools, rural mail delivery, recreational centers, social advantages and other property benefits to an extent that highway users cannot be expected to pay the cost of these facilities. The following tabulations include the reconnaissance reports of the several routes included in the projected system, including tabulations of cost and revenues as well as potential traffic volumes.

PROJECTED PRIMARY HIGHWAYS

Designation

A-1

Beginning in the vicinity of Eltopia on PSH 11, thence in a northerly and northwesterly direction to a connection with PSH 7 in the vicinity of Soap Lake with a wye connection to PSH 7 in the vicinity of Adrian.

A-2

Beginning in the vicinity of Cold Creek on SSH 11-A, thence in a northerly direction to the vicinity of Wahluke (crossing the Columbia River between Coyote Rapids and Priest Rapids), thence in a westerly and northerly direction to a connection with Highway A-1 approximately 5 miles south of Othello.

A-3

Beginning in the vicinity of Othello on Highway A-1, thence in an easterly direction to a connection with Highway A-4 in the vicinity of Cunningham.

A-4

Beginning in the vicinity of Connell on PSH 11, thence in a northerly direction through Hatton and Cunningham to a connection with PSH 11 at Lind.

A-5

Beginning in the vicinity of Burke on PSH 7, thence in a northeasterly direction to a connection with PSH 7 approximately 5 miles south of Ephrata.

LENGTH AND TRAFFIC VOLUMES ON PROJECTED STATE HIGHWAYS

| | Designation | Miles | Average Daily Traffic | Vehicle Miles |
|---------|--------------------------|-------|-----------------------------|------------------|
| PRIMARY | | | | |
| A-1 | Eltopia to Soap Lake.... | 74.6 | 2010 | 150,000 |
| A-2 | Cold Creek to Othello... | 38.0 | 1974 | 75,000 |
| A-3 | Othello to Cunningham.. | 15.9 | 1810 | 28,800 |
| A-4 | Connell to Lind..... | 26.0 | 2830 | 73,600 |
| A-5 | Burke to Ephrata..... | 15.1 | 1200 | 18,100 |
| | TOTAL | 169.6 | 2037 | 345,500 |

Route A-1

This north and south routing begins at Eltopia on PSH 11, 17 miles north of the junction of PSH 3 and PSH 11 at Pasco. PSH 3 serves the Yakima Valley Reclamation Projects, the Walla Walla and Palouse country. Pasco, in all probabilities, will be the head of navigation on the Columbia River for some time to come and is served by the Northern Pacific, S. P. & S., and Union Pacific Railroads and will be one of the most important distributing centers in the Basin Area.

This line will serve five east and west routes and passes near towns of promising outlook, such as SSH 11-A near Mesa, A-3 near Othello, B-3 near Warden, PSH 18 near Moses Lake and PSH 7 at Soap Lake and Adrian, and will be an important section of the shortest, most direct and feasible route between Pasco and Grand Coulee Dam, also serving the richest parts of the eastern portion of the Basin Area and will serve as the best route between Eastern British Columbia and Eastern Oregon.

This route is 74.6 miles in length with an estimated cost of \$1,737,000.00.

The selected standard calls for 150-foot minimum width of right of way, with a roadbed width of 36 feet, 22-foot bituminous surface with 7-foot shoulders, and the normal standard of curvature and gradient are set at 3° maximum for curves and 5 per cent maximum for grades.

The sections involved and the estimated length and cost of each are as follows:

| | Miles | Cost per Mile | Cost | Total Cost |
|----------------------------------|-------|------------------|-----------|---------------|
| PSH 11 Eltopia to | | | | |
| Othello | 26.0 | at \$23,000 | \$590,000 | |
| Othello to PSH 18.. | 19.0 | 20,000 | 380,000 | |
| PSH 18 to PSH 7 | | | | |
| at Soap Lake.... | 26.0 | 20,000 | 520,000 | |
| "Y" Connection at | | | | |
| Adrian | 3.6 | 20,000 | 72,000 | |
| Four Grade Separations | | | 175,000 | \$1,737,000 |

PSH 11 Add 2 Lanes

| | | | | |
|-------------------|------|--------|-----------|-------------|
| Pasco to Eltopia. | 17 | 17,000 | \$289,000 | |
| TOTAL | 74.6 | | | \$2,026,000 |

The estimated traffic volumes (yearly daily average) varies considerably, having a maximum of 3,200 vehicles to a minimum of 1,800 vehicles with an estimated 150,000 vehicle miles, averaging 2,010 vehicles per day.

This route joining PSH 11 will necessitate the improvement of PSH 11, which is now a two-lane highway, from Eltopia to Pasco, to a four-lane highway as the

estimated traffic volumes will range from a minimum of 4,800 to a maximum of 7,310 vehicles per day between the above towns.

Route A-2

This route serves as the most feasible outlet for the major portion of the Basin Area to a connection with PSH 5 over Chinook Pass and White Pass leading to Southwest Washington, to PSH 8 leading to the industrial area of Vancouver and Portland, and also serves as a portion of the most feasible route from Spokane to Yakima. This highway will give a connection with the C. M. St. P. & P. Railroad branch line at Riverland on the south bank of the Columbia River for railroad shipment of products originating from 120,000 acres to be irrigated on the Wahluke slope located on the north side of the Columbia River.

The selected standard calls for 150-foot minimum width of right of way, a roadbed width of 36 feet, 22-foot bituminous type surface with 7-foot shoulders. The normal standard of curvature and gradient are set at maximum 3° for curves and $5\frac{1}{2}$ per cent for grades, with the exception of the 6-mile section over the Saddle Mountains where a concession to topography to avoid excessive costs was made and a maximum of 7° for curvature was set.

This route is 38 miles in length with an estimated cost of \$1,555,000.00 which includes the estimated cost of \$850,000.00 for the construction of a bridge over the Columbia River. The sections involved and the estimated length and cost of each are as follows:

| A-2 | Designation | Section Length | Cost Per Mile | Cost |
|-----|--|----------------|---------------|-------------|
| | Cold Creek to Columbia River | 6.0 | \$25,000 | \$150,000 |
| | Columbia River Bridge and Approaches | 1.0 | | 850,000 |
| | Columbia River Bridge No., 2 mi. | 2.0 | 30,000 | 60,000 |
| | 2 mi. North of River to Saddle Mountains | 23.0 | 17,000 | 391,000 |
| | 2 mi. over Saddle Mountains. | 2.0 | 20,000 | 40,000 |
| | 4 mi. to Connection of N. & S. Highway South of Othello. | 4.0 | 16,000 | 64,000 |
| | TOTAL | 38.0 | | \$1,555,000 |

The estimated traffic volumes (yearly daily average) varies from a maximum of 3,400 vehicles to a minimum of 1,800 vehicles, averaging 1,974 vehicles per day with an estimated 75,000 vehicle miles.

This route joining SSH 11-A will necessitate the improvement of SSH 11-A from Cold Creek to a connection with PSH 3 in the Yakima Valley to primary highway standards of the same set for A-2.

Route A-3

This route serves as a connecting link between Highways A-1 and A-4, forming a portion of the direct routing from Spokane to Yakima and points in Southwest Washington. It also accommodates traffic leading to and from towns of promising outlook with railroad facilities; Othello, situated in a rich agricultural area and served by the main line of the C. M. St. P. & P. Railway, and Cunning-

ham, served by the main line of the Northern Pacific Railway.

The selected standard calls for 150-foot minimum width of right of way, a roadbed width of 36 feet, 22-foot bituminous type surface with 7-foot shoulders. The normal standard of curvature and gradient are set at maximum 6° for curves and 5 per cent for grades.

This route is 15.9 miles in length with an estimated cost of \$254,000.00 and an average cost of \$16,000.00 per mile.

No. 13312

In the United States Court of Appeals
for the Ninth Circuit

STATE OF WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION

BRIEF FOR THE UNITED STATES

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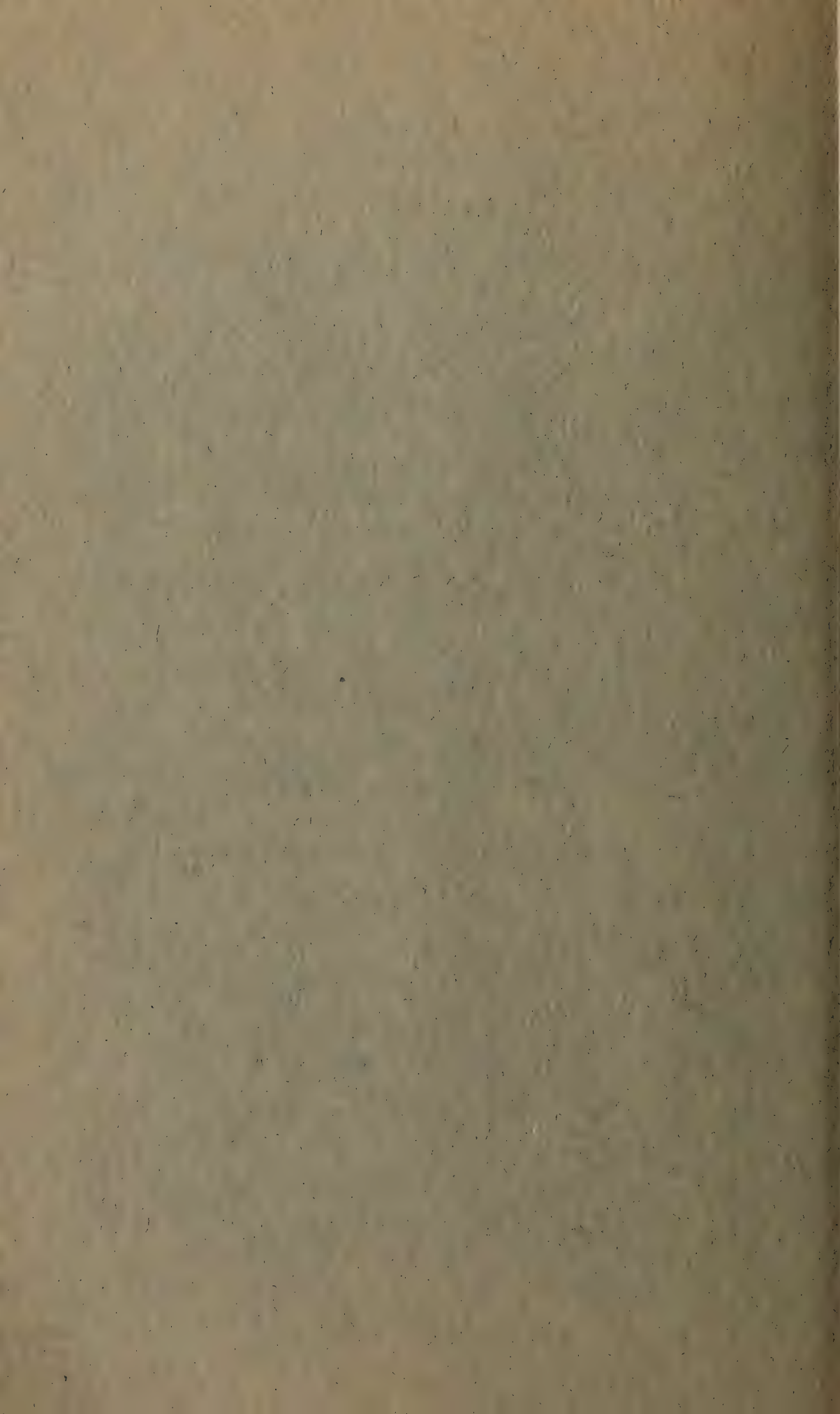
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FILED

SEP 5 1952

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In the United States Court of Appeals for the Ninth Circuit

No. 13312

STATE OF WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON, SOUTHERN
DIVISION*

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not write an opinion. Its oral statement upon setting aside the jury verdict and directing entry of judgment for nominal damages is set out in the Record at pages 615-619.

JURISDICTION

This is an appeal from a condemnation judgment entered February 7, 1952 (R. 49-53). Notice of appeal was filed February 29, 1952 (R. 54). The jurisdiction of the district court was invoked under the Act of August 18, 1890, 26 Stat. 316, as amended by the Acts of July 2, 1917, 40 Stat. 241; April 11, 1918, 40 Stat. 518, 50 U. S. C. sec. 171, and by Title II of the Second War Powers Act of March 27, 1942, 56

Stat. 176, 177, sec. 201, 50 U. S. C. (1940 ed.) Supp. V, sec. 171 (a). The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Whether the district court properly set aside the jury verdict and entered judgment for nominal damages on the ground that there was no substantial evidence to support the jury's finding that there was a reasonable necessity for the replacement of the highway taken by the United States.

STATEMENT

This condemnation proceeding was instituted on July 21, 1943, at the request of the Secretary of War to acquire all highway easements within a specified area of the Hanford Engineer Works, including a portion of Secondary State Highway No. 11A (R. 3-12).¹ Simultaneously, a declaration of taking was filed (R. 12-19), and \$1.00 was deposited in court as just compensation for the interest of the State of Washington in the highways taken (R. 18, 21-22).

Secondary State Highway No. 11A was a graveled road extending approximately 90 miles from the city of Yakima in Yakima County in a generally easterly direction across Benton County to the town of Connell

¹ The original petition excepted from the taking that portion of Highway No. 11A lying within the project area between the right of way of the Chicago, Milwaukee, St. Paul and Pacific Railroad and the Columbia River (R. 5). However, the petition was subsequently amended to include that portion of the highway (R. 27-41). It was stipulated that July 23, 1943, was the date of taking for all purposes (R. 62).

in Franklin County (R. 64, 167–168, 198–200, 228–229; Defendant’s Original Exhibit No. 2). The highway had been originally constructed in segments by the three counties through which it ran, and these segments had been maintained by the counties as county roads until 1937, when the State of Washington established a secondary road system and declared the county roads to be a secondary State highway and a branch of primary State Highway No. 11, running from Pasco in a generally northeasterly direction to Spokane (R. 164–165, 122, 227–228; Defendant’s Original Exhibit No. 2; see Laws of Washington (1937), ch. 207). After being designated as a secondary State highway in 1937, Highway No. 11A was not improved in any way by the State, but thereafter the highway was maintained by the State highway department, and a free ferry was established across the Columbia River at Hanford (R. 231–232, 425, 463–464, 517).²

Prior to the taking, graveled highway No. 11A was the most direct route between Yakima and Connell, being approximately 33 miles shorter than the paved route over primary state highways Nos. 3 and 11 via Pasco (R. 88, 97–98, 232–233, 320, 336, 434). It also afforded the shortest route between Yakima and Spokane (R. 88),³ and together with secondary high-

² Prior to the establishment of the free ferry at Hanford, the crossing of the Columbia River on the route of 11A was made by means of a privately operated toll ferry (R. 517).

³ The distance from Yakima to Spokane over route 11A was 203 miles, while the distance over primary state highways through Ellensburg was 219 miles, and the distance through Pasco was 245 miles (R. 88, 168).

way No. 11B, which joined primary highway No. 11 a few miles south of Connell, it afforded access to the Colfax-Pullman area in eastern Washington (R. 237-238, 285-286, 334-335; Original Exhibit No. 2). However, this through traffic, including that from Yakima to Connell, was very light, there being only a daily average of 47 vehicles making the ferry crossing over the Columbia River in 1941 and a daily average of 41 vehicles in 1942 (R. 188-190, 232-233, 310, 315-317, 530),⁴ and the primary purpose served by highway No. 11A was to provide access to and from towns along its route, including Hanford, and the adjacent farming area, including lands in the Priest Rapids Irrigation District (R. 241-242, 421-422, 432, 443-444, 530, 533-534, 542-544).

When the United States established the Hanford Engineer Works in 1943, and the roads within the project area were closed to the general public, all residents of the project area (Hanford, White Bluffs, and the Priest Rapids Irrigation District) were removed, leaving only government employees and em-

⁴ Of course, all of the ferry traffic was not through traffic, but was made up in part of people in the Hanford-White Bluffs area traveling to Connell and beyond, and of farmers on the east bank of the Columbia River going back and forth to Hanford (R. 479, 543-544). However, there was a sharp conflict as to what percentage of the total ferry traffic was local traffic. A government witness estimated the local traffic at from 80% to 90% of the total (R. 422-424, 478-480), while appellant's witnesses estimated the local traffic at from 10% to 15% (R. 578, 587-588). Hence, the absolute maximum for through traffic was less than 40 vehicles per day on the average, and could have been as little as five vehicles.

ployees of government contractors (R. 242, 244-245, 547-550). Although a 28-mile segment of highway No. 11A was thus closed (R. 225), the two ends of the highway, i. e., from the west boundary of the project to Yakima and from the east boundary to Connell, were still available to the public and in fact were substantially improved at the expense of the Government (R. 242-244, 271-272, 551, 553). The traffic diverted from highway No. 11A has not imposed any appreciable burden on other highways (R. 426), and the former users of No. 11A have not been subjected to any particular hardship or inconvenience by being compelled to travel on primary state highways (R. 97-100, 163, 187-190, 232-233, 326-331, 425-427).

After a long delay, during which attempts were made to negotiate a settlement of the matter (R. 82-83, 279-281; Original Exhibit No. 10), the case came on for trial before a jury in May of 1951 (R. 61). Appellant offered many witnesses (residents of the area, road engineers and state legislators), who testified that in their opinions a substitute road for highway No. 11A was necessary to connect Yakima and Connell, to preserve its cross-state features, and to provide for the prospective development of the South Columbia Basin (R. 70-407; see especially R. 94-101, 158-165, 187-191, 227, 232-245, 286, 294-299, 310-311, 320, 326-331, 336-337, 341-343, 345-350, 355-357, 361-362, 373-374, 377-381). The court excluded evidence as to the prospective development of the Columbia Basin (R. 126-152), and later instructed the jury that in the determination of the necessity for replace-

ment of highway No. 11A the anticipated development of the Columbia Basin was not to be considered (R. 599). In furtherance of its case, appellant also offered testimony as to a proposed substitute road which would be constructed, partly over existing county roads, from the junction of No. 11A at the westerly boundary of the project area in a northerly direction to Vernita on the Columbia River, across the river at that point by free ferry, then northerly to Beverly, then easterly to Othello, and thence southerly to Connell, at an estimated cost of \$1,117,556.58 (R. 66-67, 72-73, 206, 215). This proposed substitute road between Yakima and Connell would be substantially longer than the original No. 11A, and would in fact be longer than the primary route through Pasco (R. 336, 433-434, 617). In traveling from Yakima to Spokane, the proposed substitute would be one mile longer than the paved road through Ellensburg (R. 88, 330).

At the completion of appellant's case in chief, the Government moved for a directed verdict in a nominal sum on the ground that reasonable necessity for a substitute road had not been shown (R. 408-414). This motion was denied (R. 414-415), and the Government presented its evidence as to necessity (R. 417-556), including several experts who testified that in their opinions no substitute was necessary because traffic diverted from No. 11A was adequately cared for on existing roads (R. 425-428, 436-437, 503-505, 516-520). One of these witnesses testified that, if a substitute road were in fact necessary, the route pro-

posed by appellant was the only possible substitute (R. 510, 524-525).

After appellant's rebuttal (R. 556-591), the Government renewed its motion for directed verdict, which was denied (R. 591). The jury found that there was a reasonable necessity for the construction of a substitute highway and returned a verdict for \$581,721.91 (R. 45, 614). The Government filed a motion for reduction of the verdict to \$1.00, or in the alternative for new trial (R. 45-46). After argument thereon, the court determined that the verdict should be vacated and judgment entered for nominal damages (R. 46, 615-619), holding that, since there were established highways shorter than the proposed substitute, and since there was no evidence that such highways were not capable of handling the total traffic, there was no substantial evidence of necessity for a substitute road (R. 617-618). In stating his reasons for this action the court expressed the opinion that the jury had been overimpressed by two considerations: (1) that a road costing a considerable amount of money had been taken and hence the government should pay for it and (2) that, despite rulings sustaining objections concerning the matter, there should be a highway connection between Yakima and the Columbia Basin area because of prospective development there (R. 615-616). An order setting aside the verdict and entering judgment for \$1.00 was entered on February 7, 1952 (R. 47-48).⁵ This appeal followed (R. 54).

⁵ No formal action was taken on the alternative motion for new trial, so that if it were conceivable that in fact there was sub-

ARGUMENT

The district court was correct in setting aside the jury verdict and entering judgment for nominal damages on the ground that the necessity for a substitute road had not been established by substantial evidence

This appeal presents as the ultimate issue whether there was no substantial evidence to support the jury's finding that there was a reasonable necessity for replacement of the portion of the highway taken, so that the district court was justified in setting aside the jury verdict and entering judgment for nominal damages. The determination of this issue requires consideration of the established standards of reasonable necessity and substantial evidence, and the application of such standards to the evidence at hand. It is submitted that after such consideration the correctness of the district court's action will be conclusively demonstrated.

A. If the traffic diverted from the highway taken can be adequately handled by existing highways without unreasonable inconvenience to the traveling public, there is no necessity for a substitute road and appellant is not entitled to more than nominal compensation

“The overwhelming weight of modern authority is to the effect that a municipality, a county, a State, or other public entity is entitled to compensation for the taking of a street, road or other public highway *only to the extent that, as a result of such taking, it is compelled to construct a substitute highway.*”⁶ *State of*

stantial evidence to support the jury verdict, this Court should not reinstate the verdict, but rather should remand with directions to pass on the motion for new trial. *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243, 254-255 (1940).

⁶ Emphasis in original.

California v. United States, 169 F. 2d 914, 924 (C. A. 9, 1948). In other words, in such cases the measure of compensation "is the cost of providing any necessary substitutes. When no substitute facilities are necessary, it follows that no compensation is allowed." *United States v. City of New York*, 168 F. 2d 387, 389 (C. A. 2, 1948). See also *Jefferson County, etc. v. Tennessee Valley Authority*, 146 F. 2d 564 (C. A. 6, 1945), certiorari denied 324 U. S. 871 (1945); *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786, 790 (C. A. 4, 1945); *United States v. Des Moines County*, 148 F. 2d 448 (C. A. 8, 1945), certiorari denied 326 U. S. 743 (1945); *Woodville v. United States*, 152 F. 2d 735 (C. A. 10, 1946), certiorari denied 328 U. S. 842 (1946); *United States v. Los Angeles County, Cal.*, 163 F. 2d 124 (C. A. 9, 1947); *United States v. State of Arkansas*, 164 F. 2d 943 (C. A. 8, 1947).

The application of this well established principle in any given case will depend upon its own peculiar facts. In cases where the Government condemns a large area and also takes highways which served only as access roads within the area, it is plain that the municipality is entitled only to nominal compensation, because the need for the roads has disappeared with the establishment of the government project. *City and County of Honolulu v. United States*, 188 F. 2d 459, 461 (C. A. 9, 1951), certiorari denied 342 U. S. 849 (1951); *State of California v. United States*, 169 F. 2d 914, 925 (C. A. 9, 1948); *Woodville v. United States*, 152 F. 2d 735, 737 (C. A.

10, 1946), certiorari denied 328 U. S. 842 (1946); *Mayor and City Council of Baltimore v. United States*, 147 F. 2d 786 (C. A. 4, 1945). The mere fact that a road, in which the local authorities may have made some investment, is taken does not mean that substantial compensation must be paid. In *State of California v. United States*, 169 F. 2d 914, 924 (1948) this Court repeated the reason why this is so, as follows:

Thus, if it is unnecessary to replace a road or to provide a substitute, the claimant here has suffered no money loss and has been relieved of the burden of maintaining the road taken.

It is likewise clear that the Government is required to provide a substitute road or the equivalent in money when it takes a segment of an arterial highway and there is in existence no other road or roads which can adequately handle the traffic diverted from the road taken. In such cases the only real dispute is as to the amount necessary to provide the necessary substitute. *City of Fort Worth, Tex. v. United States*, 188 F. 2d 217 (C. A. 5, 1951); *United States v. State of Arkansas*, 164 F. 2d 943 (C. A. 8, 1947); *Jefferson County, etc. v. Tennessee Valley Authority*, 146 F. 2d 564 (C. A. 6, 1945), certiorari denied 324 U. S. 871 (1945). But this does not mean that in every case where a segment of a through highway is taken the Government is obliged to provide a replacement. If after the taking the highway system provides "road facilities equal in utility to

those destroyed," there is no requirement that additional facilities be provided. *Jefferson County, etc. v. Tennessee Valley Authority*, 146 F. 2d 564, 565 (C. A. 6, 1945), certiorari denied 324 U. S. 871 (1945); *City of Fort Worth, Tex. v. United States*, 188 F. 2d 217, 223 (C. A. 5, 1951). In other words, the substitute for the road taken may be found in other parts of the highway system. And no substantial compensation is due to the State if such other roads "serve the municipality's requirements and needs in as adequate a manner and extent and with equal utility as such system would have provided had the facility in question not been condemned, so far as this is reasonably practical." *City of Fort Worth, Tex. v. United States*, 188 F. 2d 217, 222 (C. A. 5, 1951); *United States v. City of New York*, 168 F. 2d 387, 390 (C. A. 2, 1948), affirming *United States v. 25.4 Acres of Land*, 71 F. Supp. 255, 257 (E. D. N. Y., 1947); *United States v. 0.886 of an Acre of Land, etc.*, 65 F. Supp. 827, 828-829 (E. D. N. Y., 1946); *United States v. Alderson*, 53 F. Supp. 528, 530-531 (S. D. W. Va., 1944). And, as stated in *United States v. Alderson*, 53 F. Supp. 528, 530 (S. D. W. Va., 1944), in determining what is reasonably practical:

The test is not what the State wants to build; not what the property owners want for their properties; and not what is the desirable thing to do. Both parties to this litigation would be very anxious to give these people the best roads possible. That would be the most desirable thing to do, but such is not the test. The question is, what is the most reasonable thing under all the circumstances?

See also *United States v. 0.886 of an Acre of Land, etc.*, 65 F. Supp. 827, 828 (E. D. N. Y., 1946).

B. The court should set aside a jury verdict and enter judgment notwithstanding the verdict, when the evidence of necessity is not of such quality as to convince an unprejudiced, reasonable mind ⁷

It is well settled that on a motion for directed verdict or judgment notwithstanding verdict, "the evidence adduced by the opposing party shall be taken as true and all reasonable inferences deducible therefrom shall be given their most favorable intendment." *Smith v. Shevlin-Hixon Co.*, 157 F. 2d 51, 53-54 (C. A. 9, 1946). Thus, it has often been said as to situations where there is substantial evidence on both sides, "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable." *Tennant v. Peoria & P. U. Ry. Co.*, 321 U. S. 29, 35 (1944); *Butte Copper & Zinc Co. v. Amerman*, 157 F. 2d 457 (C. A. 9, 1946). However, in making the primary determination as to whether or not there is substantial evidence a district judge is not a "mere automaton." *Gunning v. Cooley*, 281 U. S. 90, 93 (1930). He must determine, "not whether there is literally no evidence, but whether there is any upon

⁷ Of course, the power of the district court to enter judgment notwithstanding verdict presents a federal question. *Herron v. Southern Pacific Co.*, 283 U. S. 91, 93-95 (1931); *Murphy v. United States District Court, etc.*, 145 F. 2d 1018 (C. A. 9, 1944), dismissed on stipulation, 325 U. S. 891 (1945). However, as pointed out by appellant (Br. 16), the question as to whether state or federal law should apply is immaterial, since both jurisdictions follow the same rule.

which a jury can properly proceed to find a verdict for the party producing it.” *Improvement Company v. Munson*, 14 Wall. 442, 448 (1871); *Butte Copper & Zinc Co. v. Amerman*, 157 F. 2d 457, 458 (C. A. 9, 1946). The crux of the matter is whether there is substantial evidence. But, “substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Edison Co. v. Labor Board*, 305 U. S. 197, 229 (1938). It “must do more than create a suspicion of the existence of the fact to be established.” *Labor Board v. Columbian Co.*, 306 U. S. 292, 300 (1939). As more elaborately defined in *National Labor Relations Board v. Thompson Products*, 97 F. 2d 13, 15 (C. A. 6, 1938):⁸

“Substantial evidence” means more than a mere scintilla. It is of substantial and relevant consequence and excludes vague, uncertain, or irrelevant matter. It implies a quality of proof which induces conviction and makes an impression on reason. It means that the one weighing the evidence takes into consideration all the facts presented to him and all reasonable inferences, deductions and conclusions to be drawn therefrom and, considering them in their entirety and relation to each other, arrives at a fixed conviction.

⁸ This case was favorably cited by the Supreme Court in connection with the above quotations from *Edison Co. v. Labor Board*, 305 U. S. 197, 229 (1938), and *Labor Board v. Columbian Co.*, 306 U. S. 292, 300 (1939); and the following quotation was quoted by this Court in *National Labor Relations Board v. Union Pacific Stages*, 99 F. 2d 153, 177 (C. A. 9, 1938).

The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought.

Hence, when the evidence is so overwhelmingly on one side as to leave no doubt what the fact is, the trial court may and should direct a verdict or render judgment notwithstanding the verdict. *Brady v. Southern Ry. Co.*, 320 U. S. 476, 479–480 (1943); *Gunning v. Cooley*, 281 U. S. 90, 93–95 (1930); *Burnham Chemical Co. v. Borax Consolidated*, 170 F. 2d 569, 573–575 (C. A. 9, 1948), certiorari denied 336 U. S. 924 (1949); *Galloway v. United States*, 130 F. 2d 467, 470–471 (C. A. 9, 1942), affirmed 319 U. S. 372 (1943); *De Zon v. American President Lines*, 129 F. 2d 404, 407 (C. A. 9, 1942), affirmed 318 U. S. 660 (1943); *Deere v. Southern Pac. Co.*, 123 F. 2d 438, 440 (C. A. 9, 1941), certiorari denied 315 U. S. 819 (1942). And, as we will show later, *infra* p. 21, an opinion of a witness cannot be considered to be substantial evidence when it is contradicted by established fact. It will now be demonstrated that the evidence at hand makes this proceeding such a case.

C. There was no substantial evidence that a substitute road was necessary because of the taking

Inasmuch as all private individuals formerly living within the area of the Hanford Engineer Works and relying upon No. 11A for access to Yakima or Connell were removed from the area, and inasmuch as the ends

of No. 11A, which were not taken, now afford better local access to those living outside the project area than they had before the taking (R. 242-245, 271, 547-553), it is undisputed that the Government's taking of a segment of No. 11A did not require the construction of any substitute local access roads (R. 150, 598). Hence, appellant must necessarily pitch its claim for substantial compensation solely upon the theory that a replacement for highway No. 11A was necessary as part of the state highway system to take care of the traffic between Connell and Yakima and also cross-state traffic (R. 68-69). However, the physical facts demonstrate that there likewise was no necessity for a substitute road to serve such purposes.

Two engineers in the state highway department, both of whom had been intimately connected with the district in which highway No. 11A was located (R. 306, 419, 420),⁹ testified that at the time of taking in 1943, No. 11A was a very unimportant part of the state highway system and that traffic thereon was

⁹ Norman Hill was district engineer for the Yakima district from 1935 until early in 1942, when he transferred to Olympia as maintenance engineer at headquarters (R. 419, 420-421). Except for the period from 1945 to 1949, he was employed at the headquarters of the highway department up to and including the trial (R. 419). He was called as a witness by the Government (R. 417, 419). Mr. T. P. Doyle, a witness called by appellant, had been district engineer for the Yakima district since 1945, and prior to that time had been assistant engineer for approximately 17 years (R. 306).

very light (R. 310, 422-424, 426). Counts of traffic across the free ferry at Hanford, which of course would be the absolute maximum of the through traffic on No. 11A, showed a daily average of 47 vehicles in 1941, and 41 vehicles in 1942 (R. 316-317). And according to the estimates of state highway engineers from 80% to 95% of this traffic was local traffic, i. e., originating or terminating in the Hanford-White Bluffs area, including the Priest Rapids Irrigation District (R. 422-424, 478-480; see also R. 241-242, 443-444, 530, 534, 543-544). Hence, it would follow that the through traffic on No. 11A averaged approximately 10 vehicles a day at the most (R. 423). It is true that two ferry operators, called as witnesses by appellant, estimated that local traffic was only 10% or 15% of the total ferry traffic (R. 397, 578-579, 587-588). However, it is clear that these witnesses were not only making a very rough guess (R. 398-399, 578-579, 587-588), but also had no way of determining what traffic was local unless the travelers were known to them to be residents of the area (R. 398-399, 578, 587). Of course, any strangers might have been visitors in the area rather than through travelers, or might even have been new residents, since the Priest Rapids Irrigation District was then being settled (R. 527, 539-540, 542). And many of the out of state automobiles noted by the ferry operators were no doubt those of new settlers from Utah and other

states (R. 539–540, 542).¹⁰ Thus, it is plain that there is no evidence which would convince a reasonable man that the through traffic on No. 11A, including that between Yakima and Connell, averaged more than 10 vehicles a day.

The lightness of the through traffic on No. 11A is readily understandable. The users of the road were faced with a ride of 90 miles on a graveled road with all its inconveniences, including dust and a rough surface (R. 161, 328, 347, 403, 425–426, 435–436, 447–448, 464, 478–479, 529, 532, 535), and in addition a delay due to the necessity of crossing the Columbia River by ferry (R. 99, 435). However, there was also available for travel between Connell and Yakima a paved highway by way of Pasco, where there was a bridge over the Columbia River (R. 385). Although this route was approximately 33 miles longer than No. 11A, the journey was more comfortable and faster, or at least entailed little or no loss in time (R. 98–100, 161, 163, 188, 232–233, 425–426, 437, 535–536,

¹⁰ The ferry operators testified that they had entered the count of out of state vehicles in the column of the ferry log headed “Trucks” (R. 577–578, 582–583, 587). This would indicate that 8% of the ferry traffic carried out of state registration in 1941, and 4% in 1942 (see R. 316–317). These percentages emphasize the weaknesses in the estimates of the ferry operators as to the percentage of through traffic and check very well with the estimates of the highway engineers, especially when it is considered that many of the travelers in out of state vehicles could be visiting in the area or new residents. See Appendix to Appellant’s Brief, pp. 153–154, 167.

541).¹¹ Similarly, for travel between Yakima and Spokane the paved route through Ellensburg was only 16 miles longer than No. 11A and was much preferable (R. 188-189, 232). Likewise, travelers from Yakima to the Pullman-Colfax area in eastern Washington preferred the paved route through Pasco (R. 155, 165).

Thus, it is plain that when the Government closed No. 11A as it went through the Hanford project, there were already in existence reasonably adequate substitute roads, i. e., the paved primary highways through Pasco and Ellensburg (R. 426-427). The former users of No. 11A have suffered little or no inconvenience, either in the comfort, time, or expense of their travel, in being confined to the primary highways (R. 99-100, 161, 163, 187-190, 232-233, 239-241, 426-427, 535-536). And the diversion of the through traffic from No. 11A, whether it be 10 vehicles or 40 vehicles per day, has not imposed any appreciable burden on the other highways (R. 426). Indeed, the light traffic diverted from No. 11A, amounting only to one or two cars per hour at the most, would hardly be noticed on the paved highways. Consequently, it follows that the existing highways were adequate substitutes for No.

¹¹ Some of the appellant's witnesses, residents of the Connell area, complained that they lost time in using the paved route because of traffic congestion in going through Pasco and Kennewick (R. 98-99, 342-343, 347, 357). However, one of these witnesses admitted making the 123-mile drive, at a time when traffic was congested, in 3 hours (R. 336), an average of 41 miles per hour for the entire trip. Clearly, travel over the gravel road could not be any faster.

11A, and that there was and is no necessity for a replacement road. *United States v. City of New York*, 168 F. 2d 387, 389 (C. A. 2, 1948); *State of California v. United States*, 169 F. 2d 914, 924 (C. A. 9, 1948); *City of Fort Worth, Tex. v. United States*, 188 F. 2d 217, 222, 223 (C. A. 5, 1951). And this is especially true when it is considered that the only feasible new route (R. 65–66, 321, 510) would, in addition to having all the inconveniences of a graveled road and a ferry crossing (R. 67, 435), be slightly longer than the already existing paved roads (R. 88, 330–331, 433–434, 617).

Appellant's brief, without citing record references, states (Br. 25) that at the time of the taking in 1943 traffic on the paved highways through Pasco and Ellensburg had already reached the saturation point. Insofar as this statement could have any materiality in the determination as to the necessity of a substitute road because of the closing of No. 11A, it has no support in the evidence. There was testimony that the capacity of a two lane highway was an average of approximately 4,000 vehicles per day (R. 287). There was also testimony that the highway bridge at Pasco was a two lane bridge (R. 385) and that in 1943 an average of 4,300 vehicles per day crossed the bridge (R. 322–323).¹² However, this evidence is of no materiality here. In the first place, even without

¹² Except for the Pasco bridge between Pasco and Kennewick and the segments of the highways immediately adjacent to Yakima, traffic on the two paved highways was well below the estimated capacity of two-lane highways (R. 322–323).

the negligible amount of traffic diverted from No. 11A, traffic on the Pasco bridge would exceed the estimated capacity. In all fairness, the United States should not be required to alleviate a condition which would exist whether or not No. 11A was closed. This is especially so since the proposed substitute would not draw any substantial amount of traffic from the existing roads (R. 342). Moreover, the count (a daily average for the entire year of 1943) does not take into consideration the fact that after the establishment of the Hanford Engineer Works early in 1943, there was a large increase in traffic in the area because of the construction and the influx of workers (R. 324, 539). But inasmuch as it would be the State's responsibility to handle this increased traffic, which would be present regardless of whether No. 11A was open or closed, such increase cannot be considered in determining the necessity of a substitute. *United States v. Alderson*, 53 F. Supp. 528, 530-531 (S. D. W. Va., 1944); cf. *United States v. City of New York*, 168 F. 2d 387, 390 (C. A. 2, 1948). Hence, while traffic counts covering 1942 and the early part of 1943 might be of some significance,¹³ it follows that the evidence relied upon (Br. 25, 26-27) has no tendency to establish necessity for a substitute road resulting from the closing of No. 11A. It is clear, therefore, that any need for additional road facilities arises from reasons other than the taking of No. 11A, and that the Government has no liability therefor.

¹³ Inasmuch as these traffic counts were in the possession of the state highway department, it is especially significant that they were not offered.

In its contention that there was substantial evidence to support the jury verdict that a substitute road was necessary, appellant relies chiefly upon the opinions expressed by road engineers, state legislators, and residents of the area (Br. 25–30, 34–37). However, these opinions, without any support in the demonstrated facts relating to necessity (*supra*, pp. 15–20), can have no weight here. *Galloway v. United States*, 319 U. S. 372, 396 (1943); *Neel v. Henne*, 30 Wash. 2d 24, 36–37, 190 P. 2d 775, 781–782 (1948); *Prentice etc. Co. v. United Pac. Ins. Co.*, 5 Wash. 2d 144, 164, 106 P. 2d 314, 323 (1940); cf. *United States v. Honolulu Plantation Co.*, 182 F. 2d 172, 178 (C. A. 9, 1950), certiorari denied 340 U. S. 820 (1950). They completely ignore such important factors as the light traffic on No. 11A, the local nature of the majority of the traffic, and the availability of adequate substitutes for through traffic over better roads and shorter distances than the proposed substitute, all of which factors were acknowledged by appellant's witnesses (R. 239–245, 310, 326–331). Indeed, witness Doyle, district engineer, admitted that No. 11A was a very unimportant highway (R. 310), and witness Dougherty, a resident of Connell (R. 331), indicated his belief that there would not be much traffic on the proposed substitute (R. 342). Other factors relied upon by appellant's witnesses in support of their opinions are clearly irrelevant here. For example, witness Doyle testified that after the closing of No. 11A, there was no crossing over the Columbia River for a distance of 90 miles between Pasco and Vantage

(R. 385, see Br. 36). However, inasmuch as the Hanford project now occupies the land on both sides of the river for most of this distance (R. 410; Original Exhibit No. 3), it is obvious that there is no necessity for the State to maintain a crossing. Also, many of the witnesses based their opinions of necessity in whole or in part upon the need of a road similar to No. 11A in the potential development of the South Columbia Basin area (R. 95-97, 156, 159, 282, 286, 295, 320-321, 360, 369, 373-374, 375-376, 378-381). The jury was instructed to disregard the anticipated development of the Columbia Basin (R. 599-600), so that opinions based upon such a factor cannot be considered of any substance.

Moreover, analysis of the testimony of appellant's witnesses will clearly reveal that, rather than testifying as to the "necessity" for replacement of No. 11A, they were merely testifying that in their opinion there was a demand for relocation, or that relocation was desirable (see especially R. 96-97, 158-159, 164, 190, 305, 335-337, 345, 355; Br. 36). It is not disputed that an alternative route would be desirable and would be of benefit to some people. However, such is not the test in determining the Government's liability to provide any necessary substitute roads. *United States v. Alderson*, 53 F. Supp. 528, 530, (S. D. W. Va., 1944); *United States v. 0.886 of an Acre of Land, etc.*, 65 F. Supp. 827, 828 (E. D. N. Y., 1946). The facts speak for themselves. In face of the facts, the opinions relied upon furnish no support for a conclusion

that a substitute road is necessary.¹⁴ Appellant's reasoning that the Government should pay for a relocation of No. 11A may be epitomized in the words of witness Klindworth: “* * * we had a road in there before the Atomic Energy Commission came in, and we should have one now” (R. 357; see also Br. 36).

Appellant (Br. 27-29) apparently would have the opinions of the state engineers given conclusive effect on the question of necessity because of the wording of state statutes. Clearly, such a contention is without merit. Adoption of the contention would mean that the state highway department would fix the compensation which the United States must pay for the taking of property. But the determination of the amount of just compensation is exclusively a judicial question. It may not be decided by any other branch of government. *Monongahela Navigation Company v. United States*, 148 U. S. 312, 327 (1893); *United States v. New River Collieries*, 262 U. S. 341, 343-344 (1923). And the need for substitute roads must rest on the facts of each case. Accordingly, factual necessity, without reference to the mandates of local law, is the

¹⁴ Appellant states (Br. 37) that the opinion of Lars Langloe, a government witness, appears to sustain the jury verdict. The testimony referred to (R. 525) is only to the effect that the proposed road would be a reasonable substitute for No. 11A, and has no bearing on the question of necessity for a substitute. See R. 503-505, 526, where this witness clearly states his opinion that no substitute was necessary because of the lack of traffic. The testimony referred to can only mean that if a substitute were necessary, the proposed route would be a reasonable and the only possible substitute (R. 510, 524).

sole consideration in determining the question of necessity to relocate a road taken. Cf. *United States v. Des Moines County*, 148 F. 2d 448, 449 (C. A. 8, 1945), certiorari denied 326 U. S. 743 (1945); *United States v. Los Angeles County, Cal.*, 163 F. 2d 124, 125 (C. A. 9, 1947).

Appellant (Br. 29-34) also relies heavily upon the contents of Original Exhibit No. 10 (set out at pages 51-131 of the Appendix to Appellant's Brief) as sustaining the jury's finding of necessity. We disagree with appellant's analysis of the force of the material in this exhibit. But more important, the material was not before the jury for consideration in determining necessity. This exhibit was admitted in evidence upon the understanding that the jury would be instructed as to what consideration they should give to it (R. 281, 289). The jury was later instructed as follows (R. 603):

You will likewise consider Exhibit 10, being correspondence and copies thereof passing between representatives of the parties hereto, only as it explains the delay in the trial of this cause and in the determination of the location of the substitute route to replace highway 11-A. No expressions of opinion or statement of cost in that exhibit shall be considered by you as evidence in any other connection.

And appellant made no exception to such limited consideration (R. 611-614). Obviously, the exhibit can not now be pointed to as any evidence of necessity for a substitute.

Lastly, appellant argues (Br. 38-40) that the district court improperly excluded evidence which would have established necessity for replacement of No. 11A. This evidence consisted of Exhibits Nos. 5, 6, 11 and 11A (reports as to the recommended highway system for the Columbia Basin; see R. 126-147, 282-283, 301-304; App. 133-175),¹⁵ Exhibits Nos. 7 and 8 (commercial and industrial studies of the City of Yakima and the Yakima Valley; see R. 170-178), and certain testimony of witness Berkey relating to development of the Columbia Basin (R. 149-151). Inasmuch as appellant did not specify these matters in its statement of points on appeal (R. 56-57), and inasmuch as these points are not adequately raised in the specifications of error in this Court (Br. 14-15), it does not appear that appellant can now rely upon such alleged errors of the court below. *Jung v. Bowles*, 152 F. 2d 726, 727 (C. A. 9, 1946). In any event, it is submitted that there was no error in the exclusion of the evidence.

All of the evidence referred to was objected to and excluded in part upon the ground that the evidence referred to a period too remote from the date of taking to have any materiality (R. 112-130, 136-139, 145-147, 149, 151, 172, 175-178, 301-304). Such exclusion is within the sound discretion of the trial court. *Jones v. United States*, 258 U. S. 40, 48-49 (1922); *United States v. 25.406 Acres of Land, etc.*,

¹⁵ References to the Appendix to Appellant's Brief are indicated "App. —."

172 F. 2d 990, 993 (C. A. 4, 1949), certiorari denied 337 U. S. 931 (1949); *United States v. Block*, 160 F. 2d 604, 607 (C. A. 9, 1947); *Clark v. United States*, 155 F. 2d 157, 161 (C. A. 8, 1946). And there is no showing here that the discretion was abused. Obviously, the occurrence of events five years after the taking and the potentialities in the more distant future could have little bearing on whether a new road was made necessary by the Government's taking in 1943. Rather, there is every indication that some event other than the taking was giving rise to the necessity.

There are additional reasons why there was no error in the exclusion of the evidence. As to Exhibits Nos. 7 and 8, they contained voluminous statistics as to the economy of the City of Yakima and the Yakima Valley in the period from 1940 to 1949 (R. 177). When it was pointed out that the exhibits contained much irrelevant matter (R. 175-176), appellant's counsel stated that they were offered to show what services and facilities were available in Yakima and the surrounding area in 1943, rather than for the statistical material, and that the information desired could be obtained from the witness (R. 176-177). Inasmuch as the witness was permitted to testify as to the nature of the community in 1943 (R. 178-185), including population trends (R. 182-184), and was permitted to testify that the only difference between 1943 and 1948 was that the facilities had expanded (R. 170-171), it appears that appellant got into evidence more than it desired through the exhibits. Clearly,

there was no error in excluding the bulky and admittedly misleading exhibits (R. 176) under these circumstances.

The road planning exhibits (Nos. 5, 6, 11, and 11A) were also properly excluded for other reasons as well as for remoteness. The statute under the authority of which the study was initiated provided for a survey concerning “present and future requirements for the establishment of public highways which may be necessary or *convenient* ¹⁶ in serving areas which may be reclaimed” (R. 134). The investigation which the reports covered was made “to plan *desirable* additions to and modifications of the road net” (App. 135, 159). Obviously, the reports covered more than *necessary* roads, which is the only issue here, and it would have been misleading to submit such reports to the jury without opportunity to cross-examine the writers of the reports.

Moreover, the plans are described as merely “general and tentative” (App. 141) and the report (Exhibit No. 5) bears the caution that, “The publication of the reports is not intended to indicate, of course, that suggestions and recommendations contained in them necessarily will be approved and carried out by the Bureau” of Reclamation and that other participating agencies are not in any way bound by the reports (App. 134–135). That the reports are in fact “general and tentative” is well illustrated by the fact that, while the original state report was made in 1941 on the basis of the average farm being 40 acres, the esti-

¹⁶ Emphasis added unless otherwise noted.

mate at the time of the federal report in 1944 was that the average farm would be 60 acres (App. 155, 156-157). Obviously, any further increase in the size of the farm units will make a great difference in the traffic estimates. Further, it is plain that changes in the proposed plan will be necessary by virtue of the fact that some of the lands in the Columbia Basin project at the time of the studies are now in the Hanford project (Cf. App. 149 and Original Exhibit No. 3). Clearly, therefore, these reports are too speculative in their nature to be of any materiality.

It is further submitted that even if the reports had been admitted, they would not be substantial evidence that a substitute road was needed at the time of taking. The state report concludes (App. 161; see also App. 168-169):

Inasmuch as water will not be available for irrigation before 1944,¹⁷ it will undoubtedly be several years before it will be necessary to construct any new roads in the area. The existing highways are adequate for the present needs and so far as circumstances are predictable for several years in the future.

Plainly, necessity for replacement of No. 11A is negated by this report and a consideration of the facts as they existed in 1943.

Indeed, the reports contain still further proof that the United States should not be held liable for the re-

¹⁷ The report was written in 1941. At the time of trial in 1951 the testimony was that lands in the vicinity of Othello would not be under water until 1953, and lands in the vicinity of Mesa (the area of particular concern here) would not be under water until 1954 (R. 113-114).

placement of No. 11A. While the reports contain passing references to No. 11A as an existing secondary highway (App. 151, 170, 171, 174), they do not propose any improvement in that highway, except for the stretch between Yakima and Cold Creek, which the Government has already improved and is open to the public (R. 242-244, 551). Rather the reports propose a primary highway (A-2) following approximately the same route as appellant's proposed substitute for 11A. (App. 149, 151, 157-158, 170, 173-174; cf. Original Exhibit No. 3.) Obviously, this new primary road was proposed in 1941 to replace the primary highways through Ellensburg and Pasco and to afford better conditions for traffic between Spokane and Yakima and other cross-state traffic (App. 151, 157, 173). Just as obviously No. 11A was to be abandoned as a carrier of cross-state traffic. Under these circumstances, accepting the reports at their face value, it is clear that construction of a road over the route proposed in this condemnation case has been found necessary for reasons other than the taking of a part of No. 11A, and that therefore the expense of any part of the road cannot be charged to the Government. *United States v. City of New York*, 168 F. 2d 387, 390 (C. A. 2, 1948).

In summary, it may be stated that the physical facts demonstrate conclusively there is no necessity for replacing any part of No. 11A because of the Government's taking, and that in the face of the physical facts the opinions expressed by appellant's witnesses have no substance. Inasmuch, as the other evidence relied upon by appellant as substantial evidence of

necessity was not before the jury, and properly so, the court did not err in setting aside the verdict and entering judgment in a nominal amount on the ground that there was no substantial evidence of necessity. Indeed, appellant's reliance (Br. 29, 30-34, 38-40) upon excluded evidence to support the jury's verdict gives added weight to the district court's definite impression (R. 615) that the verdict was influenced by such factors.

CONCLUSION

For the foregoing reasons, it is submitted that the judgment of the district court should be affirmed.

Respectfully,

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SEPTEMBER 1952.

In the
United States
Court of Appeals
for the Ninth Circuit

UPON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

*Attorneys for the State of
Washington, Appellant.*

Office and Postoffice Address: Capitol Theatre Bldg., Olympia, Wash.

067 1952

PAUL F. O'BRIEN

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No. 13312

In the

United States
Court of Appeals
For the Ninth Circuit

STATE OF WASHINGTON, *Appellant,*
vs.
UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE EASTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

STATEMENT

The statement of the case as contained in Pages 1-15, appellant's brief, supplemented by pages 2-7, brief of appellee, will fairly inform this court of the background for this appeal.

QUESTION

Both parties concede the question to be: Whether or not there was substantial evidence to support the verdict of the jury or whether or not the trial judge was correct in setting aside the verdict.

ARGUMENT

I

The Necessity For Replacement of Highway 11-A Was A Question of Fact Which The Jury Properly Resolved in Favor of The State

In advance of our discussing the question of replacement, necessity for replacement and the evidence thereon concerning highway 11 A, we desire to point out that, despite exhaustive search on our part, there is no case which we have found in the reports, or which has been called to our attention, involving the condemnation of highways, which is on all fours with the facts in this case, or which in slang of the profession can be considered "white cow".

Counsel for appellee contends that certain of the highway condemnation cases upon which they rely are decisive in their favor on the questions here. We contend that they are as much, if not more, in favor of appellant.

The question of necessity for a certain highway and the replacement of it is one of fact that must be determined in each case by the peculiar facts in that case. The disagreement between appellant and the appellee is not on the law but in applying that law to the facts in this case.

In answer to some of the assertions made in the brief of appellee, we point out the facts in a number of the principal cases relied upon by its counsel.

State of California v. United States, 169 F. (2d) 914-924 (C.A. 9, 1948) is cited as authority for the proposition that the state is entitled to compensation on the taking of a highway only when it is compelled to construct a substitute highway. The facts in that case show that the dedicated street involved was under 20 to 24 feet of water and no substitute way could possibly be constructed.

In *United States v. Los Angeles County, Cal.* 163 F. (2d) 124, 125 (C.A. 9, 1947) cited by appellee, this court stated:

“The evidence shows that a substitute road was necessary. The county had authority to provide such a road. Whether it could have been compelled to do so is immaterial.”

The facts in that case are not detailed, but it appears that a through road was severed by the taking. Similarly a through road, highway 11 A, was severed by the taking in this case.

United States v. Des Moines County, 148 F. (2d) 448, 449 (C.A. 8, 1945) certiorari denied 326 U.S. 743 (1945) is quoted by appellant (App. Br. 20, 21). The case was reversed because damages were awarded on a wrong theory. In the opinion the court there says:

“We have no doubt of the existence of the duty of the appellee to provide for a necessary readjustment of their road system. Whether the duty is express or implied or one which arises from necessity, we regard as of no legal consequence.”

In *Jefferson County v. Tennessee Valley Authority*, 146 F. (2d) 564, 566 (C.A. 6, 1945) certiorari denied 324 U.S. 871 (1945) the road was replaced by the condemning agency and therefore there was no damage.

In *Mayor and City Council of Baltimore v. United States*, 147 F. (2d) 786, 787 (C.A. 4, 1945) the taking was of alleys which were closed and there was no obligation on the city to reopen them.

In *Woodville v. United States*, 152 F. (2d) 735, 737 (C.A. 10, 1946) certiorari denied 328 U.S. 842 (1946) no recovery was allowed because all of the town was taken for flooding. There was no obligation and indeed no opportunity to construct substitute highways.

In *United States v. State of Arkansas*, 164 F. (2d) 943 (C.A. 8, 1947) a substantial sum was paid into court and the condemning agency was providing a substitute for the highway taken. The only matter in issue was the cost of establishing and operating a temporary ferry.

In *City and County of Honolulu v. United States*, 188 F. (2d) 459, 461 (C.A. 9, 1951) certiorari denied 342 U.S. 849 (1951) it was conceded that it was not necessary to provide any substitute highway.

We respectfully urge that there was and is a necessity for the establishment of a substitute highway for that portion of highway 11 A taken in this case. Counsel argues that there are other highways that are hard surfaced and that makes it unnecessary to provide a sub-

stitute for highway 11 A. We feel that the appellee is confusing two distinct issues, one the necessity of replacement, and the other, the quality of the road taken. The latter has to do with the evidence on compensation.

In 1937 when secondary state highways, including highway 11 A, were established in the state there were then, and were at time of trial, a goodly number of such highways which were graveled roads substantially in the condition of highway 11 A at the time of the taking. Some of these highways carried less than 40 to 50 cars daily, nevertheless they were constantly operated and maintained by the state (R 556-557). The physical condition and the number of vehicles using the highway taken are not determinative of the necessity of replacement. *United States v. Wheeler Township*, 66 F. (2d) 997, 983, 984 (C.A. 8, 1933).

Highway 11 A served a definite cross state purpose as distinguished from a local purpose. (App. Op. Br. 26, 27, 34-37). Any argument on this phase is a dispute upon the evidence which the jury resolved in favor of the state.

It might here also be observed that the trial judge precluded further testimony by appellant on the question of necessity for replacement of highway 11 A. (R. 325, 326, 371, 372).

Counsel for appellee argues that the taking of highway 11 A, because of the light traffic thereon, did not

cast any additional burden on other existing highways (Br. 18-20). Said counsel calls attention to the fact that the capacity of a two-lane highway is 4,000 cars daily (R. 287) and that at the time of the taking the daily average of vehicles on the Pasco-Kennewick Bridge was 4,300 cars. We stated further on page 27 of our opening brief that the traffic count at Selah Junction then was 4,000 cars per day (R. 323). The record also shows that there was then a daily average of 5,300 vehicles at the south city limits of Yakima (R. 322).

Thus it clearly appears that the two highways or routes which counsel says were available to travelers through Yakima, from or to southwest and northeast and east central Washington, were crowded and saturated and the taking of highway 11 A closed the alternate.

Can it be said that the state is or was not entitled to keep the alternate, that the state has lost nothing by the taking? Under the evidence in this case the state seeks only the cost of building another alternate to the standard of the highway taken.

Established and owned highways and routes therefore are valuable assets of the state. They are constantly developed as need requires.

The jury, as well as other people, knew that in 1943, the time of the taking, the population of the state of Washington was rapidly increasing, not because of the

Hanford project, but because of the war and the migration of easterners to the west.

In 1940 the population of this state was 1,093,419. In 1950 the population was 1,736,191, a gain of 37% (United States Census of Population: 1950—U.S. Department of Commerce, Bureau of Census Population Report P-A47 Reprint Volume 1 Chap. 47). This court may take judicial notice of this fact. 20 Am. Jur. Sec. 98, p. 112, Sec. 27, p. 55, Sec. 53 p. 77; *Greeson v. Imperial Irr. Dist.* 59 F. (2d) 529; *The Appollon*, 22 U.S. 362, 6 L. Ed. 111.

On this phase of the matter the jury, on the evidence before it, was certainly justified in concluding that because of 1943 increasing population and traffic needs, it was necessary to construct the alternate route 3 (Exhibit 3) for the highway taken.

The necessity for highway 11 A and for replacement thereof was all a matter of evidence. That evidence came before the jury in the form of testimony of users of highway 11 A, residents at or near its termini, and highway engineers and legislators who had made study of the state highway system. All such witnesses testified that construction of the substitute or replacement highway was necessary.

The quality of the roadway, whether hard surfaced or not, would, of course, determine to some extent the number of users. But for the taking, highway 11 A would

have been available and it would have been improved from time to time as required. Problem 19—Rejected exhibits 11 and 11 A, in fact, contemplated the construction of a new bridge over the Columbia River at the point where the testimony in this case for substitute route 3 (Exhibit 3) indicated the operation of a state ferry. Rej. Ident. 11, App. Op. Br. Appx. D, pages 157, 173, 174, see also map App. Op. Br. page 149. Further, that exhibit, as said before, presupposed the continued existence of highway 11 A and provided for a connection with 11 A with a highway across the aforesaid planned bridge and easterly along Wahluke slope as shown by Route 2, (Exhibit 3) in this case.

The increasing of the population in 1943, the development of the Columbia Basin area temporarily stopped by the war in 1943, the taking and closing of highway 11 A, as well as the other facts in this case, all made more evident to the jury the necessity for replacement of highway 11 A.

The evidence of use, the number of cars or vehicles local or otherwise, the traffic on other highways, the demand made for replacement regardless of whether such demand was from community chambers of commerce, all added up to a substantial showing of necessity. Suppose the number of through vehicles across highway 11 A had been shown to have been substantially greater. Would

counsel for appellee say that any certain number of users will show necessity while a lesser number will not?

Future development of the state would require in time a hard surface for 11 A, but the route, the gravel road, was the state's before the taking. We feel that the rearranging of the highway system to the extent disrupted by the government should be compensated for by it.

The record shows that the evidence on compensation was based on cost of construction of a roadway of comparable quality (R. 198, 203-208, 309, 310, 386, 402-404). The appellant is entitled to a roadway of comparable quality, even though highway 11 A was of the lowest type, and even though there was a comparatively small amount of traffic on it. *United States v. Wheeler Township*, 66 F. (2d) 977, 983, 984 (C.A. 8, 1933).

II

The Trial Judge Weighed The Evidence, Reached A Conclusion Different From That of the Jury, Then Improperly Set Their Verdict Aside

Counsel argues in his brief (Br. 12, 13) that the question is whether there is substantial evidence to sustain the verdict. We agree that is the problem. If there is substantial evidence, then the trial judge erred. The brief of appellee however seems to argue disputed questions of fact, matters for the jury's determination.

The importance of the highway was testified to by many witnesses, expert and otherwise, as were the facts upon which each might have voiced an opinion. (R. 89-96, 166-172, 294-296, 331-340, 351-355). The quantity of local and through traffic is discussed by appellee (Br. 16, 17). The facts in that respect were quite different than the appellee states them to be (R. 577, 588). This is true also for the congestion on other roadways. (R. 322, 323).

We respectfully call attention to our opening brief (App. Op. Br. 16-19) and the argument and authorities on the question of setting aside the verdict. Counsel has, by arguing appellee's evidence and taking the most favorable view thereof, sought to imply there is no conflict. He is, in effect, justifying the trial court in substituting its judgment for that of the jury.

The evidence is not to be weighed by the trial court on the motion to set aside the verdict. *Sartor v. Arkansas National Gas Corp.*, 322 U.S. 767, 64 S. Ct. 724, 729.

Because of the substantial evidence which we have above pointed out, as in this case, on the question of necessity, we feel that the trial judge's decision resulted only from his weighing of the evidence and reaching a conclusion different from that of the jury.

III

The Trial Judge Improperly Rejected Evidence Of Existing 1943 Plans For Development Of Highways And Of The Columbia Basin Area

Counsel for appellee urges (Br. 25) that this point

was not properly set forth in the statement of points on appeal and specification of errors. As we interpret the rules of this court, we are not required to outline the argument, but rather to apprise this court and opposing counsel, in the statement of points and specification of errors, of matter to be considered by the court on appeal.

In the statement of points (R. 56) Point No. 2, we stated in substance that the trial judge erred in holding that the verdict of the jury was not supported by substantial evidence and in holding that no substantial evidence was adduced in trial establishing, or tending to establish, necessity for replacement. Adduced means offered or brought forth. We considered that all of the evidence, both offered and admitted, was clearly within the designation of that particular point.

For the assignments of error in our brief, we respectfully refer to page 15 thereof, and assignment 5. We could not have been more explicit unless we referred specifically to the exhibits by number and to the statements sought to be elicited from the witnesses. We do not interpret the rules of this court as requiring that practice. Certainly counsel for appellee was present at trial and he knows what evidence was excluded.

Counsel cites cases which hold that the admission of evidence is discretionary (Br. 25, 26). These decisions pass upon the evidence offered to establish value of

property in eminent domain cases. Here the evidence offered was to show the reasonable necessity of the highway taken. We contend that the evidence and exhibits rejected and referred to in the opening brief (App. Br. 38-40) were admissible as relevant and competent. The exhibits for Identification 11 and 11 A were prepared long before the Hanford project was conceived. They showed the permanent character of highway 11 A. It was recognized as an integral part of the state system. The exhibits show its contemplated use and presuppose its continued and uninterrupted existence. The exhibits, like the testimony of the witness Beckey (R. 104-133) and the map prepared by him (Iden. 5 and 6 Rej. R. 133-151), were admissible to show that the use of highway 11 A was taken for granted in planning for future development. The weight to be given that evidence was for the jury under proper instructions. To have the court reject the evidence and then state that there was no substantial evidence to go to the jury was error, cured by the verdict, but again reemphasized by the order setting aside the verdict.

In *Clark v. United States*, 115 F. (2d) 157, 161 (C.A. 8, 1946) the court says:

“The discretion, however, is not an arbitrary one, but must be exercised judicially, and where, as here, there can not be said to be a market value the inquiry may properly cover a wide scope.”

In *United States v. 25.406 Acres of Land*, 172 F. (2d)

990, 994 (C.A. 4, 1949) certiorari denied 337 U.S. 931 (1949) the court had before it the question of admissibility of plans for future development of the area taken. On this phase the court stated:

“The development as to which testimony was allowed was one which had been carefully planned in detail before the taking by the government and one which would have been carried out but for the taking.”

That opinion further quotes from *Metropolitan Water District v. Adams*, Cal. Sup. 116 P. (2d) 7, 20, 21, as follows:

“This evidence showed that the projects, far from being purely remote, conjectural, and speculative, lay well within the realm of probable achievement and economic feasibility. They were not conceived or outlined for the mere purpose of proving a point in this litigation or creating a market for the property, but represent the fruit of years of study and effort on the part of expert engineers * *”.

The state of development in 1943 in the Columbia Basin, the laws pertaining to the planning on the project and the delay due to the war, all emphasize the admissibility of the plans and disclose the necessity for and continued use of highway 11 A. The evidence was admissible, its weight was for the jury.

The report discusses “desirable additions to and modifications of the road net” of which highway 11 A was a part. The report assumes its continued use. “Existing highways” refers to highway 11 A. Counsel argues

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The state of development in 1943 in the Columbia Basin, the laws pertaining to the planning on the project and the delay due to the war, all emphasize the admissibility of the plans and disclose the necessity for and continued use of highway 11 A. The evidence was admissible, its weight was for the jury.

The report discusses “desirable additions to and modifications of the road net” of which highway 11 A was a part. The report assumes its continued use. “Existing highways” refers to highway 11 A. Counsel argues

that since the report says the “existing highways are adequate for present needs,” that means that the government can close highway 11 A without upsetting the highway system. We are discussing a highway that existed and was used in 1939 when the law was passed providing for the study (Ch. 169, Laws of 1939) and in 1941 when the report was made (Idents. 11 and 11 A) and when the amending Columbia Basin Act of March 10, 1943 was passed (57 Stat. 14) to set up the projects for canals, farm units and roads, both existing and to be constructed. The testimony and offered exhibits were erroneously rejected.

The jury was entitled to consider plans of projected development as such plans existed on and before the inception of the Hanford Project. In 1943 gas rationing was in force, the result of World War II was in doubt, and all development was at a standstill.

Necessity was to be determined by normal conditions. The jury made that determination under proper instructions. As the court said in *United States v. 25.406 Acres of Land*, 172 F. (2d) 990, 995 (C.A. 4, 1949) certiorari denied 337 U.S. 931 (1949)

“In cases of this sort, we must never forget that the common sense of the twelve men on the jury is a surer guaranty of justice than any attempt that might be made to give logical application to antiquated rules of evidence. If an honest and intelligent jury is given all the facts and is correctly instructed as to the law, it will come pretty near

deciding a case correctly. Artificial rules of evidence which excluded from the consideration of the jurors matters which men consider in their everyday affairs hinder rather than help them at arriving at a just result.”

The ultimate complete development of the Columbia Basin and the need for highway 11 A as a connecting link from southwest Washington and Yakima, through the Columbia Basin into Spokane and Northwest and Central Eastern Washington, was a reality in 1943. This was a matter which the twelve on the jury, under the statement made by the court of appeals, fourth circuit in the above 172 F. (2d) 990 case, were warranted in considering as fact in their everyday affairs. The trial court was clearly in error in rejecting appellant’s exhibits 5, 6, 11 and 11 A.

IV

The Only Motion Made By Appellee Was For Judgment Notwithstanding The Verdict And To Set The Verdict Aside

Appellee states in a footnote (Br. 7 and 8) that the court has not passed on the alternative motion for new trial. Counsel loses sight of the fact that the court accepted the government’s oral amendment to the motion (R. 618). An “Order Setting Aside Verdict and Directing Entry of Judgment” was prepared and presented by the attorney for appellee. That order recites (R. 47)

“* * * and the petitioner, United States of America, having at the time of argument, amended its motion to move for judgment notwithstanding the verdict and to set aside the verdict * * * that no good purpose could be served by granting a new trial in this proceeding * * *”.

The court has passed upon the only motion before him, the amended motion. The order is a complete one. We deem counsel's question in footnote 5 answered by the amendment to the motion and the order.

CONCLUSION

In closing we here observe that if state highway 11 A had not been taken and closed, the state would have had that highway for improvement of an alternate direct route connecting Yakima and southwest Washington with the Columbia Basin, Spokane and Eastern Washington. The highway taken not only could have carried its own traffic, but it could have been utilized as a connection into the Columbia Basin area and to relieve the congestion on the other highways, all of which is now precluded the state by reason of the taking in this case. If the government's theory is correct, the state will perpetually at its own expense be required to divert all traffic around the entire project area through Pasco or Ellensburg, and build other highways into the Columbia Basin area without any compensation from the government for the taking of the alternate highway 11 A. The state would doubtless have construct-

ed an alternate route prior to trial if it had been determined where the United States would have permitted that route (Exhibit 10). An alternate for 11 A into the Columbia Basin and across the state must now be constructed over the only route available, Route No. 3, Exhibit N. 3. The only alternative will be for the state, at great additional burden and expense, to rebuild and realign existing highways or build other highways as best it can to partially alleviate conditions caused by the taking of alternate route highway 11 A.

We respectfully urge that the theory of the trial court and of counsel for appellee in this case results in the enrichment of the United States at the expense of the state of Washington, in violation of the Fifth Amendment to the Constitution. The judgment of the trial court should be reversed with direction to reinstate the verdict.

Respectfully Submitted,

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No. 13,327

IN THE
United States Court of Appeals
For the Ninth Circuit

ALFRED DUSSELDORF,

Appellant,

VS.

HARLEY O. TEETS, Warden, California
State Prison at San Quentin, California,

Appellee.

BRIEF FOR APPELLEE.

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DEC - 4 1952

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No. 13,327

IN THE

**United States Court of Appeals
For the Ninth Circuit**

ALFRED DUSSELDORF,

Appellant,

vs.

HARLEY O. TEETS, Warden, California
State Prison at San Quentin, California,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

On March 5, 1952, Alfred Dusseldorf filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California, Northern Division (R 1).

Judge Goodman denied the writ (R 14).

The next day Judge Goodman denied Dusseldorf's application for a certificate of probable cause (R 16).

On March 7, Dusseldorf sought and was granted a certificate of probable cause by Chief Judge William Denman of this Court (R 17). This is the appeal from the denial of the writ.

STATEMENT OF THE FACTS.

Alfred Dusseldorf was convicted of murder in the first degree and sentenced to death by the Superior Court of the State of California, County of Alameda.

His conviction was appealed to the Supreme Court of California. The conviction was affirmed by the California Supreme Court. The opinion appears at 37 Cal. 2d 801.

The details of the crime appear in that opinion.

“* * * On October 14, 1949, at about 1:30 in the afternoon, George Gaertner was found lying on the floor, mortally wounded in Bloomheart's Tavern on San Pablo Avenue in Emeryville, where he was employed as a bartender. Irvin Condre, working at the time at a service station across the street from Bloomheart's, heard the firing of some shots. As he looked in the direction of the noise, he saw three colored men, wearing Army fatigue uniforms, leave the tavern, walk to the corner, and then break into a run to a car double-parked on a side street. They drove away before he could note the license number. Condre then entered the tavern, where he found no one except the bartender outstretched on the floor, moaning and in a semiconscious state, with blood on the front of his shirt. Without regaining consciousness, Gaertner died early the next morning. His death resulted from the hemorrhage of both lungs and the heart in consequence of gunshot wounds.

The police arrived at the tavern within a few minutes after Condre. Upon making a search of the premises, the police found no gun but they

did discover two bullets, one embedded in a post and the other lying on the seat of a booth, where it had apparently ricocheted. Some three months later a gun was found by some workmen in the course of doing some excavating work in De-Fremery Park in Oakland. Both the gun and the bullets were introduced in evidence at the trial; and a ballistics expert testified that these two bullets had been fired from that gun.

Miller was first apprehended and taken into custody on November 8, 1950, more than a year after the commission of the crime. He was questioned by the Chief of Police of Emeryville, and he signed a written statement, made about 1 p.m., wherein he admitted that he had participated 'about one year ago' in the 'Bloomheart stickup'. He stated that one evening when he, Dusseldorf, and another colored man met in San Francisco, Dusseldorf said that he knew 'where to make some money, not stating where'; that the next day the three of them drove across the bridge to Bloomheart's Cafe on San Pablo Avenue; that upon entering the tavern, they found no one there except the bartender; that he, Miller, heard one of the two men with him say 'This is a holdup'; that Dusseldorf was carrying a revolver; that he, Miller, heard two shots fired, and that he and his two companions then fled from the tavern.

Later that same afternoon Miller made a similar, though more detailed statement to an assistant district attorney about the 'robbery and shooting', saying that he was 'willing to tell what happened' there. Again Miller recounted the preliminary meeting of himself and his two confederates to plan a 'job' to make some money;

their trip the next day from San Francisco across the bridge to Bloomheart's Tavern on San Pablo Avenue; their entry into the tavern, with Dusseldorf being the only one carrying a gun; the remark of one of the men, as they walked by the counter, that 'This is a holdup,' and immediately thereafter his hearing a shot; his running toward the door as he heard a second shot fired; and then the escape of all three in the car which had been left double-parked on the street. Miller stated that his part in the 'job' was to act as a 'look-out', stationed near the door. Both of these statements were admitted in evidence only as against Miller.

On the evening of November 8, 1950, and following Miller's account of Dusseldorf's involvement in the Bloomheart 'job', Dusseldorf, who had also been taken into custody that day, gave his statement to the same assistant district attorney. While admitting his participation as one of the trio in the planned robbery of the tavern, Dusseldorf transposed the roles that he and Miller played at the scene of the homicide, Dusseldorf maintaining that he did not enter the place but stood at the door and that it was Miller who fired the shots just after their companion had said 'This is a holdup'. Dusseldorf further stated that they had used his car, a grey Chrysler, to make the trip; that after the shooting, he drove all three to the home of a friend, where they changed their clothes, and that he, Dusseldorf, threw the ones which they had been wearing into a garbage can; that at that time he hid the gun in his friend's house but retrieved it some two weeks later, when he finally disposed of it by throwing it into a

‘bunch of cement blocks’ near where a swimming pool was under construction in DeFremery Park in Oakland. This statement was admitted in evidence only against Dusseldorf.

Condre, the service station attendant who went to Bloomheart’s Tavern immediately after the shooting, positively identified Miller and Dusseldorf both at the trial and on the occasion of the preliminary examination a month after their arrest. He also testified that they were wearing ‘Army fatigue clothes’ as he saw them leave the tavern. There was testimony that on the afternoon in question ‘a colored fellow’ was seen putting a ‘pair of coveralls in the garbage can’ on the premises where, according to Dusseldorf’s statement, he and his two companions had gone to change their clothes; and that later that day the coveralls were recovered from the garbage can and turned over to the police. These coveralls were introduced in evidence and identified by Condre as similar in appearance to those worn by the three men as they left the tavern. Condre also described the ‘getaway’ car as blackish grey in color.

Neither Miller nor Dusseldorf testified at the trial. Their separate extra-judicial statements, as above detailed, agree in the main pattern of events up to a certain point—the identity of the person who allegedly did the actual shooting—with Miller and Dusseldorf each claiming that the other was the one who fired the gun.”

People v. Miller, 37 Cal. 2d 801, at 803-805.

In his petition for habeas corpus the appellant contends that he was not represented by counsel of his

choice and that he was ineffectively represented by counsel.

These are the facts asserted in the petition.

While the petitioner was incarcerated awaiting trial he met another inmate whose attorney was W. D. Belcher.

The inmate suggested that inasmuch as Dusseldorf wanted to get in touch with his mother perhaps Mr. Belcher could convey the message (R 7).

Mr. Belcher visited Dusseldorf and told him he would go to his mother with the message (R 7). Dusseldorf told Mr. Belcher that he did not want to hire any attorney until he talked with his mother. Dusseldorf did not want Belcher to represent him because he thought he lacked the skill necessary to defend this robbery-murder charge (R 7).

The petition then alleges that Mr. Belcher went to petitioner's mother and told her that petitioner wanted to retain him as his attorney.

After thus securing the mother's approval Belcher went back to the jail and told petitioner that the mother wanted him to be retained as counsel (R 8).

The petitioner reluctantly accepted him. Mr. Belcher assured the petitioner that if he conducted the defense the petitioner would get a light sentence or an acquittal and under no circumstances death. Mr. Belcher said he would investigate and have a strong defense ready (R 8).

Subsequently the petitioner conferred with Belcher and attempted to find out what Belcher was doing to prepare a defense. Belcher assured him everything was going well but would divulge no details (R 8).

On the day of the trial petitioner forced Belcher to admit that he had not prepared a defense (R 8).

The petitioner informed the trial Court that he did not think Belcher was prepared and that he desired a continuance to secure another attorney (R. 9). The Court denied the request.

The judge informed petitioner that he could discharge Belcher if he wished but that the trial would go ahead. The judge advised the petitioner that he should retain Belcher rather than going ahead by himself or hiring an attorney unfamiliar with the case (R 9).

The case went to trial and, the petitioner asserts, his fears concerning the ability of his counsel proved well founded. Mr. Belcher did not call any witnesses; he did not put the petitioner on the stand (Belcher said he would make it bad for petitioner if he took the stand); he did not attack the falsity of the confession admitted into evidence against the petitioner; he did not attempt to prove any defense (R 9).

On these facts the petitioner concludes he was deprived of due process of law in the proceedings which resulted in his conviction.

On these facts the District Court refused to issue the writ and the case is here on appeal.

SUMMARY OF APPELLANT'S CONTENTIONS.

I. The appellant was denied counsel of his own choosing in violation of the 14th Amendment to the Constitution of the United States.

II. The appellant was ineffectively represented by counsel in violation of the 14th Amendment to the Constitution of the United States.

SUMMARY OF APPELLEE'S ARGUMENT.

I. The appellant has not exhausted his State remedies as required by Title 28 U.S.C. Sec. 2254 because his contentions could and should have been presented to the Supreme Court of California on the appeal from his conviction.

A. Dusseldorf *could* have presented his contentions to the Supreme Court of California on the appeal of his conviction.

B. Dusseldorf *should* have presented his contentions to the Supreme Court of California on the appeal of his conviction.

II. Because the petition does not allege facts which, if true, would entitle the appellant to relief the District Court properly dismissed the petition.

A. The facts alleged in the petition are insufficient as a matter of law to show that the California trial Court denied Dusseldorf counsel of his choosing.

B. The facts alleged in the petition are insufficient as a matter of law to show that the trial court denied Dusseldorf the right to effective representation of counsel.

ARGUMENT.

- I. THE APPELLANT HAS NOT EXHAUSTED HIS STATE REMEDIES AS REQUIRED BY TITLE 28 U.S.C., SECTION 2254, BECAUSE HIS CONTENTIONS COULD AND SHOULD HAVE BEEN PRESENTED TO THE SUPREME COURT OF CALIFORNIA ON THE APPEAL OF HIS CONVICTION.

The asserted lack of due process upon which the petition in this case is based is two-fold. First, it is claimed that the trial Court denied the appellant his constitutional right to be represented by counsel of his choice and, second, it is claimed that counsel who represented the petitioner was so incompetent and inefficient that the representation amounted to a nullity and there was therefore in practical effect a denial of the appellant's constitutional right to be represented by counsel.

In this portion of our argument we put aside the merits of these contentions.

It is our position that the State of California provided the appellant with adequate post-conviction corrective process by way of appeal from the judgment; that there was no barrier either legal or otherwise to the availability of this corrective process to the petitioner; and that because he failed to invoke this

corrective process the appellant cannot now raise these questions in a habeas corpus proceeding.

In *Jennings v. Illinois*, 72 S. Ct. 123 (1951) the Court said:

“Petitioners claim that they are held in custody in violation of the federal constitution in that coerced confessions were used to obtain their convictions. Where, as here, a federal claim can be raised at the trial, it may be forfeited by failure to make timely assertion of the claim. And, if a state provides a post-conviction corrective process, that process must be invoked and relief denied before a claim of denial of substantial federal rights may be entertained by a federal court.” (p. 126.)

By failing without excuse to exhaust the corrective process by way of appeal provided by the state of California Dusseldorf has failed to exhaust his state remedies as required by title 28 U.S.C. Sec. 2254.

Title 28 *U.S.C.* Sec. 2254 provides:

“An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the state
* * *”

In the revisor's note to the section it is stated:

“This new section is declaratory of existing law as affirmed by the Supreme Court. See *Ex parte Hawk* (1944), 64 S. Ct. 448, 321 U.S. 119, 88 L. Ed. 572.”

Ex parte Hawk, supra, stated the rule thus:

“Ordinarily an application for habeas corpus by one detained under a state court judgment of conviction for crime will be entertained by a federal court only after all state remedies available, *including all appellate remedies in the state courts* and in this court by appeal or writ of certiorari have been exhausted.” 321 U.S. 114, 116 (emphasis supplied).

A. Dusseldorf could have presented his contentions to the Supreme Court of California on the appeal of his conviction.

The appellant asserts that he was deprived of his right to counsel of his choosing. He bases the assertion on a colloquy with the trial judge in chambers before the trial at which time he informed the trial judge that he did not want his present counsel to continue in the case. All this is a matter of record. Deprivation of counsel of one's choice in this manner can be and is in the normal case argued on appeal. *Calif. Const.*, Art. I, sec. 13; *People v. Gay*, 37 Cal. App. (2d) 246 [99 Pac. (2d) 371]; *People v. Pearson*, 41 Cal. App. (2d) 614 [107 Pac. (2d) 463]; *People v. Stroble*, 36 Cal. (2d) 615, 628 [226 Pac. (2d) 330]; *People v. Manchetti*, 29 Cal. (2d) 452, 456 [175 Pac. (2d) 533].

It can be argued on appeal in the Federal Courts. *United States v. Gutterman* (2d Cir. 1945), 147 Fed. (2d) 540; *United States v. Mitchell* (2d Cir. 1943), 137 Fed. (2d) 1006, affirmed on rehearing 138 Fed. (2d) 831, certiorari denied 321 U.S. 794.

Similarly the appellant's claim that he has been denied effective assistance of counsel could have been

urged on appeal in California. Again this lack of counsel or representation by counsel so inadequate as to amount to no counsel at all (*Powell v. Alabama*, 287 U.S. 45) are not matters dehors the record. Lack of counsel would be apparent to the most casual observer thumbing through the record. Lack of effective assistance of counsel (if it is such to make the trial a sham and a mockery of justice. *Powell v. Alabama*, supra, 287 U.S. 45; *Diggs v. Welch* (D.C. 1945) 148 Fed. (2d) 667) would certainly be apparent to the seven justices of the California Supreme Court who scrupulously examine the record in these death penalty cases in California.

In short, the claim can be raised on appeal in California. *People v. Chesser*, 29 Cal. (2d) 815 [178 Pac. (2d) 761] (judgment reversed for ineffective assistance of counsel relying on *Powell v. Alabama*, 287 U.S. 45) cf. *People v. Ballentine*, 39 A.C. 199.

In the Federal Courts lack of effective assistance of counsel can be argued on appeal. *Seadlund v. United States* (7th Cir. 1938), 97 Fed. (2d) 742; *Paschen v. United States* (7th Cir. 1934), 70 Fed. (2d) 491, 495.

B. Dusseldorf should have presented his contentions to the Supreme Court of California on the appeal of his conviction.

In the Federal Courts the writ of habeas corpus cannot be used to perform the function of an appeal. *Goto v. Lane*, 265 U.S. 393, 402; *Riddle v. Dyche*, 262 U.S. 333; *Craig v. Hecht*, 263 U.S. 255, 277; *Sunal v. Large*, 332 U.S. 174.

The same rule applies in California. *In re McInturff*, 37 Cal. (2d) 876 [236 Pac. (2d) 574]; *In re Conner*, 16 Cal. (2d) 701, 108 Pac. (2d) 10.

Indeed it is more than probable that this was the ground upon which Dusseldorf's petition to the Supreme Court of California was denied. Dusseldorf was represented at the trial by Mr. Belcher. On appeal the Supreme Court appointed Joseph R. Rankin to handle Dusseldorf's case. The Supreme Court affirmed the conviction in November. Shortly thereafter a petition for habeas corpus was filed presenting questions which were at all times within the knowledge of the petitioner, which appeared on the face of the record and which were not even hinted at on the appeal. It is not at all startling that the Supreme Court denied the petition without issuing the writ.

That a state may validly apply such a rule is apparent. As well stated by Mr. Justice Frankfurter in the dissent to *Jennings v. Illinois*, 72 S. Ct. 123, 128:

“What is a substantial federal question? Certainly whether a claim which could have been raised by the method of direct review of the trial proceedings but was not, must be allowed to be raised in some collateral attack, is not a substantial question. Such a requirement cannot be made of the States under the Fourteenth Amendment. It is not enforceable even as to federal prosecutions. *Sunal v. Large*, 332 U.S. 174, 67 S. Ct. 1588, 91 L. Ed. 1982.”

The California rule is substantially the same as the federal rule. As the California Supreme Court stated in *In re Wallace*, 24 Cal. (2d) 933:

“A violation of the defendant’s constitutional rights during the trial leading to his conviction is ground for attack on the judgment in a habeas corpus proceeding if the petitioner has no other adequate remedy to test the constitutionality of the proceeding resulting in his conviction. [Citing cases.] Petitioner could not appeal from his conviction on the ground on which he now relies, for he obtained the information underlying his petition only after Wehr’s death in 1939, when the time for appeal had expired.”

The Court then considered the petitioner’s claim that the prosecution had knowingly employed perjured testimony to secure his conviction on the merits. cf. The federal rule as analyzed by the United States Supreme Court in *Sunal v. Large* (1946), 332 U.S. 174 178, 179.

The crucial question therefore when determining whether an accused *should* resort to an appeal or be foreclosed from a later collateral attack is whether an appeal was available as a practical matter. See *Johnson v. Zerbst* (1937), 304 U.S. 458, 467.

If a defendant is denied counsel at the trial that denial may be the very reason he cannot appeal, *Johnson v. Zerbst*, supra, 304 U.S. 458, or if the defendant is represented by ineffective counsel at the trial and the same counsel takes the appeal ineffective assistance of counsel will probably not be urged.

But the facts in Dusseldorf's case are not even similar to these. In Dusseldorf's case a new attorney was appointed by the Supreme Court of California, the facts relied on were not dehors the record. The only conceivable reason for not raising the question is that it was deemed unmeritorious and not important.

In *Moore v. Shuttleworth* (6th Cir. 1950), 180 Fed. (2d) 889, 890 the petitioner urged lack of effective representation of counsel. The Court held that:

“This was a matter which if deemed important, should have been addressed to the consideration of the district court and was no doubt reviewable on appeal but it could not be made the subject of a collateral attack on habeas corpus.”

There is no substantial distinction between the case at bar and the case of *Canizio v. New York* (1945), 327 U.S. 82.

In the *Canizio* case the petitioner pleaded guilty in a New York Court without the assistance of counsel and without notice of the charge against him. Accepting this plea was reversible error and a denial of the right to counsel guaranteed by the 14th Amendment. *Hawk v. Olsen*, 326 U.S. 271. But subsequently and before sentencing, counsel was appointed for the accused. The Supreme Court held that since counsel could have moved to withdraw the guilty plea and he elected not to do so, the petitioner could not collaterally attack the unlawful guilty plea. In the opinion the Supreme Court recognized that if counsel had made such a motion to withdraw the plea it would

have had to be granted and if it were not granted the Supreme Court would have reversed. But by making this conscious election he had waived his right to question the validity of the plea.

Compare the *Canizio* case to the case at bar. Dusseldorf alleges he was denied the effective representation of counsel of his choosing at the trial. On appeal, under the guidance of a new attorney appointed by the Supreme Court he did not raise the question. He has waived his right to raise the question just as Canizio did. *Gayes v. New York* (1946), 332 U.S. 145, 148, 149; *U. S. ex rel. Rogalski v. Jackson* (2d Cir. 1944), 146 Fed. (2d) 251; *Sanderlin v. Smythe* (4th Cir. 1943), 138 Fed. (2d) 729.

Because Dusseldorf did not raise on appeal the questions he now asserts, he has failed to invoke the corrective process of the State of California and the judgment of the District Court denying his petition should be affirmed. Title 28 U.S.C., Sec. 2254.

II. BECAUSE THE PETITION DOES NOT ALLEGE FACTS WHICH, IF TRUE, WOULD ENTITLE THE APPELLANT TO RELIEF THE DISTRICT COURT PROPERLY DISMISSED THE PETITION.

- A. The facts alleged in the petition are insufficient as a matter of law to show that the California Trial Court denied Dusseldorf counsel of his choosing.**

The petition alleges that the petitioner was forced to trial without the assistance of counsel of his choice. This conclusion is based on the following facts.

(1) The petitioner did not want Belcher as his counsel from the beginning (R 7).

(2) He only retained Belcher through Belcher's trickery (R 7, 8).

(3) Petitioner discovered that Belcher wasn't doing anything to prepare a defense (R 8).

(4) On the day of the trial the petitioner informed the Court that he desired to discharge Belcher, that Belcher was not prepared. Petitioner asked for a continuance to secure other counsel.

(5) The trial judge informed the petitioner that he could discharge Belcher if he wished but that the trial was going to go ahead that day. The trial judge advised petitioner to keep Belcher, who was familiar with the case, rather than try to defend himself (R 9).

Do these facts, if true, make the trial a sham and the judgment void? We submit that they do not.

In the first place the method by which Mr. Belcher was retained by the appellant is entirely immaterial to this inquiry. Appellant did not call the trial Court's attention to the facts of which he now complains, but consciously elected to go ahead. He can not at a later date complain.

In *Hudspeth v. McDonald* (10th Cir. 1941), 120 Fed. (2d) 962, the petitioner was complaining that his attorney was drunk throughout the trial. The Court pointed out that the petitioner had never informed the Court that he was dissatisfied with his counsel.

“There is a vast difference between lacking the effective assistance of competent counsel and being denied the right to have the effective assistance of competent counsel. It is the denial of the right to have such assistance that gives the right to challenge a judgment by writ of habeas corpus. It is held without exception that the right to have counsel may be waived and that it is only when it is not waived that the validity of the proceedings may be challenged by writ of habeas corpus.”

The only remaining facts pertinent to the denial of counsel of his choice are that the petitioner told the trial judge that he did not think his counsel prepared, and he wanted a continuance to secure other counsel.

Does the judge's refusal to appoint other counsel and continue the case constitute a lack of due process? The cases cited in appellant's brief do not so hold. The two Indiana cases deal with the construction of Article I, Sec. 13 of the *Indiana Constitution*. They are not material. The Federal cases we will deal with later.

The appellant's claim in the case at bar is substantially the same as the petitioner's in *Swope v. McDonald* (9th Cir. 1949), 173 Fed. (2d) 852. The only distinction is that the petitioner in the *McDonald* case had a much stronger case.

The *McDonald* case was an appeal from an order discharging the petitioner, taken by the United States to the full bench of the Court of Appeals for this circuit sitting in bank. In that case, as in this, the petitioner alleged that he was forced to trial with

counsel not of his choosing. Essentially these were the facts.

There was bad feeling between McDonald and his attorney prior to the trial. This bad feeling arose over the attorney's failure to attempt to secure McDonald's release pending trial by writ of habeas corpus. McDonald felt so strongly about it that prior to the trial he lodged a complaint with the Bar Association.

On the opening day of the trial McDonald told his attorney that he wanted to discharge him. McDonald then informed the Court of the differences between himself and his counsel and told the judge of the complaint filed with the Bar Association. Apparently McDonald requested appointment of other counsel. But the judge said the trial would go on.

The Court of Appeals for the Ninth Circuit sitting in bank unanimously held that the trial judge was not required to halt the trial and appoint other counsel. The Court pointed out that McDonald could have represented himself if he so desired but that he did not make that request.

In the case at bar the trial judge informed Dusseldorf that he could represent himself if he wished but that the trial would go on.

In the *McDonald* case the Court said:

“Some breach of genuine gravity in the attorney-client relationship must appear before discontinuance of the trial could be thought essential.” (p. 854.)

The only breach alleged in Dusseldorf's petition is that he felt his attorney unprepared. If the Federal Court did not deny due process at law to McDonald, the State of California did not deny due process of law to Dusseldorf.

In the *McDonald* case the petitioner relied on *Glasser v. United States*, 315 U.S. 60, just as the appellant does here. The Court rejected McDonald's argument.

"We turn finally to *Glasser v. United States*, supra. In that case the trial court, over objection, had appointed Glasser's attorney, Stewart, to represent also an alleged co-conspirator, who turned out to be much more deeply embroiled than Glasser. In considering the claim of prejudice resulting the court indulged in no *a priori* assumptions. It surveyed the entire record and found there persuasive evidence that the appointment of Stewart as counsel for the alleged co-conspirator had in fact embarrassed and inhibited Stewart's conduct of Glasser's defense. It pointed to numerous and critical instances in which Stewart found himself unable faithfully to serve two masters. We see no resemblance between the situation found to obtain in that case and that developed here." (p. 856).

B. The facts alleged in the petition are insufficient as a matter of law to show that the trial Court denied Dusseldorf the right to efficient representation of counsel.

The appellant alleged that his counsel was inefficient at the trial and that the appellant was thus deprived of due process of law. These are the allegations:

(1) Mr. Belcher did not call any defense witness;

(2) Mr. Belcher did not put Dusseldorf on the stand;

(3) Mr. Belcher told Dusseldorf he would make it bad for him if he took the stand;

(4) Mr. Belcher did not attack the falsity of the statement introduced into evidence against Dusseldorf.

We submit that these facts do not allege a denial of due process of law. Again we point out that what may have gone on between Dusseldorf and his attorney uncommunicated to the trial Court is immaterial to the question of whether the trial was void for lack of due process. *Hudspeth v. McDonald* (10th Cir. 1941) (120 Fed. (2d) 962); *Diggs v. Welch* (D.C. 1945), 148 Fed. (2d) 667, 670; *Dorsey v. Gill* (D.C. 1945), 148 Fed. (2d) 857, 875; *United States v. Wight* (2d Cir. 1949), 176 Fed. (2d) 376, 379.

The other facts alleged are not at all abnormal in criminal trials. The defendant's failure to take the stand is so common that it is almost the rule in criminal cases. Failure to produce defense witnesses thus relying on the presumption of innocence is also quite common. Indeed it is considered good strategy when the only available witnesses are not too strong. Failure to attack a confession put in evidence is also common. Again this is considered by some to be good strategy. To attack it only emphasizes it and in the event the attack fails the man is finished. But by

ignoring it the defense can berate it on argument in the hope that there may be cast upon it some reasonable doubt of its validity.

Significantly no complaint is made of the *voir dire*, the cross-examination of witnesses, the formulation of instructions, the arguments to the jury, or the motion for a new trial and arguments thereon.

Consider the allegations of the petition in light of the decisions.

It was early recognized that the requirement of counsel cannot be satisfied by mere formal compliance. The first recognition of this and still the leading case on the subject is *Powell v. Alabama*, 287 U. S. 45.

Mr. Justice Minton when Circuit Judge for the Seventh Circuit had occasion to discuss this case in *United States ex rel. Weber v. Ragen* (7th Cir. 1949), 176 Fed. (2d) 579, 586.

“No case has better indicated the constitutional right of a defendant to counsel and its fulfilment than *Powell v. State of Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158, 84 A.L.R. 527. There the trial court appointed the entire bar of the county as counsel. The defendants had counsel and competent counsel, but what was everybody’s responsibility became no one’s responsibility and the imposing array of counsel just went through the motions of giving the defendant a trial. *That was a denial of due process because it destroyed the essential integrity of the proceedings.* Nothing in this record remotely suggests such failure of counsel.” (Emphasis supplied).

Speaking again of the requirement of counsel Mr. Justice Minton in *U. S. v. Ragen* (7th Cir. 1948), 166 Fed. (2d) 976, 980, pointed out that the petitioner's counsel was an old man and that there was considerable evidence of inefficiency.

“Whenever the court in good faith appoints or accepts the appearance of a member of the bar in good standing to represent a defendant, the presumption is that such counsel is competent. Otherwise, he would not be in good standing at the bar and accepted by the court. The constitutional requirements have been met as to the necessity of counsel. If the action of counsel in the presence of the court in the conduct of the trial reduces the trial to a travesty of justice, such action might be considered on the presumption that such a trial was a denial of due process. The conduct of counsel in the trial of a case is that of only one of the officers of the court whose duty it is to see that the defendant receives a fair trial. He is only one of the actors in the drama. The best of counsel makes mistakes. His mistakes, although indicative of lack of skill or even incompetency, will not vitiate a trial unless on the whole the representation is of such low caliber as to amount to no representation and reduce the trial to a farce. A fair appraisal of the record in this case does not remotely approach such a state.”

This rule expressed by Judge Minton finds universal acceptance in the cases. The representation by counsel, if it is to be of such low caliber as to amount to a lack of due process, must be such as that the trial is a farce, a sham and a mockery of justice.

Diggs v. Welch (D.C. 1945), 148 Fed. (2d) 667; *Merritt v. Hunter* (10th Cir. 1948), 170 Fed. (2d) 739; *Morton v. Welch* (4th Cir. 1947), 162 Fed. (2d) 890; *Andrews v. Robertson* (5th Cir. 1944), 95 Fed. (2d) 101; *Conley v. Cox* (8th Cir. 1943), 138 Fed. (2d) 786; *Achtien v. Dowd* (7th Cir. 1941), 117 Fed. (2d) 989; *Pierce v. Hudspeth* (10th Cir. 1942), 126 Fed. (2d) 337; *Dorsey v. Gill* (D.C. 1945), 148 Fed. (2d) 857. Some of the reasons for the rule were discussed in *Diggs v. Welch*, supra, p. 669.

“The result of such an interpretation would be to give any Federal prisoner a hearing after his conviction in order to air his charges against the attorney who formerly represented him. It is well known that the drafting of petitions for habeas corpus has become a game in many penal institutions. Convicts are not subject to the deterrents of prosecution for perjury and contempt of court which affect ordinary litigants. The opportunity to try his former lawyer has its undoubted attraction to a disappointed prisoner. In many cases there is no written transcript and so he has a clear field for the exercise of his imagination. He may realize that his allegations will not be believed but the relief from monotony offered by a hearing in court is well worth the trouble of writing them down. To allow a prisoner to try the issue of the effectiveness of his counsel under a liberal definition of that phrase is to give every convict the privilege of opening a Pandora’s box of accusations which trial courts near large penal institutions would be compelled to hear. * * * For these reasons we think absence of effective representation by counsel must be

strictly construed. It must mean representation so lacking in competence that it becomes the duty of the court or the prosecution to observe it and to correct it. * * * They are all cases where the circumstances surrounding the trial shocked the conscience of the court and made the proceedings a farce and a mockery of justice.” (p. 470.)

The allegations in Dusseldorf’s petition certainly do not even indicate that his trial was a farce or a mockery of justice. The occurrences of which he complains are not even extraordinary but are frequent in criminal trials. The District Judge properly concluded that the petition was insufficient as a matter of law. Title 28 U.S.C., Sec. 2243. *Walker v. Johnston*, 312 U.S. 275.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the dismissal of the petition for habeas corpus be affirmed.

Dated, San Francisco, California,
November 28, 1952.

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No. 13333

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC CONTACT LABORATORIES, INC., MORRIS GREEN,
and LEE W. HOGGAN,

Appellants,

vs.

SOLEX LABORATORIES, INC.,

Appellee.

APPELLANTS' OPENING BRIEF.

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AUG 14 1952

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Appellee.

APPELLANTS' OPENING BRIEF.

This is an appeal by the defendants below from a final judgment of the United States District Court for the Southern District of California, Central Division [R. 21], in an action for infringement of the two claims of United States Letters Patent No. 2,510,438 [Ex. 1; R. 239] and for trade-mark infringement.

Jurisdiction.

Original jurisdiction is vested in the District Court by 28 U. S. C. 1338-a, and jurisdiction to review the appealed judgment is vested in this court by 28 U. S. C. 1292(4). Final judgment [R. 21] was entered December 7, 1951. Motion for new trial was filed by appellants on December 17, 1951 [R. 24] and was denied January 3, 1952 [R. 39]. Notice of appeal was filed February 1, 1952 [R. 45].

Statement of Case.

Appellee (who was plaintiff below and is hereinafter referred to as plaintiff) charged appellants (who were defendants below and are hereinafter referred to as defendants) with infringing United States Letters Patent No. 2,510,438, issued to K. M. Tuohy [Ex. 1; R. 239], relating to contact lenses.

Defendants were also charged with trade-mark infringement, because of their use of the descriptive term "cornea lens" to describe their corneal contact lenses; plaintiff alleging that it had a trade-mark right in the term "corneal lens."

The judgment held the two claims of the patent in suit valid and infringed and also restrained defendants from using the term "cornea lens" to describe their product.

Contact lenses are a type of eye glass in which the lens fits in contact with the eyeball, as distinguished from being mounted in a frame.

In so far as physical structure is concerned, a contact lens is nothing more than a transparent, concavo-convex shaped piece of glass or plastic ground to correct deficiencies in vision. Contact lenses are old in the art. For an early contact lens patent, see *Volle* patent No. 722,059, issued March 3, 1903 [Ex. H; R. 251]. Because they are worn in direct contact with the eyeball, and are therefore somewhat irritating to the eye [R. 137], their use has been and still is rather limited.

Contact lenses are held against the eyeball by surface tension with the eye fluids. Where the eye fluids are in-

sufficient, they are supplemented by so-called buffer solutions.

The earliest contact lens had a concavo-convex central portion which covered only the cornea or “limbus” portion of the eye, and had a surrounding flange which extended over a part of the white or “scleral” portion of the eye and under the eyelids, called the “scleral flange.” Such a lens is shown by the above-mentioned *Volle* patent [Ex. H], wherein the corneal portion is indicated by the numeral 1 and the scleral flange is indicated by the numeral 2. *Lincke* patent 2,000,768 [Ex. G; R. 248], also shows such a lens. This type of contact lens is known as the “scleral” type.

Gradually, it was found that, in some cases, the scleral flange could be eliminated, leaving only the corneal portion. This lens without the flange became known as the “corneal” type lens. The Tuohy patent in suit relates to this type of lens. A book, Obrig, “Contact Lenses,” published in this country in 1942, describes the old Kalt corneal lens. See quotation from this book at page 15 of the Tuohy file wrapper [Ex. 2]. Long before patentee Tuohy entered the field in 1948, Dr. Green, one of the defendants in this case, made corneal lenses, in 1946, by trimming the scleral flanges from some scleral type lenses [R. 135-7, 149; Ex. 3].

Both types of contact lens are the same in construction except that one has the scleral flange and the other does not.

Eye doctors and oculists have used various techniques of fitting contact lenses. For instance [Ex. I; R. 255], a publication called "The Optician"; and [Ex. K; R. 265] an excerpt from the February, 1946 issue of "The Optometric Weekly," describe various techniques.

While the Tuohy patent in suit is an *article* patent, purporting to cover lens construction, in reality it merely describes a technique or *method* of fitting a corneal lens on the eye in a way to leave clearance for the eye fluids. The method involves an indefinitely expressed relationship between the radius of the lens and the radius of the eye which it is to fit.

Mr. Tuohy did not apply for his patent until 1948. He was employed by Obrig at the time Obrig published his above-mentioned book "Contact Lenses" in 1942, so that he obviously knew of the Kalt lens described in that book.

After the trial, defendants discovered important new evidence of the early history of contact lenses, and moved for a new trial in order to be able to produce this evidence [R. 24]. Dr. Green's affidavit [R. 28]; Dr. Peter C. Kronfeld's affidavit [R. 30]; and an article "How New is the Corneal Lens," published in "The Ophthalmic Dispenser" of May, 1950 [R. 32], accompanying the motion, are most illuminating, and certainly indicate that, before granting a final judgment enabling patentee Tuohy to appropriate the techniques developed by various technicians over the years, the Trial Judge should have reopened the case and heard the newly discovered evidence which the defendants had been unable to discover before the trial. However, the Trial Judge denied the motion for new trial.

Specification of Errors.

Defendants submit that the trial court erred:

(1) In holding that the patent in suit discloses anything involving patentable invention;

(2) In holding the patent in suit valid despite the fact that its claims fail to describe the alleged invention with the particularity and certainty required by the statute;

(3) In holding that a patent containing only article claims can monopolize a method of using the article;

(4) In awarding attorneys' fees;

(5) In denying defendants' motion for new trial based upon important newly discovered evidence; and

(6) In restraining defendants from using the descriptive term "cornea lens" to describe their corneal lenses.

The errors specified under paragraphs 1, 2 and 3 are raised by paragraphs 1, 2, 3, 4, 5 and 6 of defendants' concise statement of points on appeal [R. 233].

The error specified under paragraph 4 is raised by paragraph 7 of said concise statement of points on appeal.

The error specified under paragraph 5 is raised by paragraphs 8 and 9 of said concise statement of points on appeal; and

The error specified in paragraph 6 is raised by paragraphs 10 and 11 of said concise statement of points on appeal.

Summary of Argument.

Point 1: THE PATENT IN SUIT, ITS PROSECUTION BEFORE THE PATENT OFFICE, AND THE PRIOR ART.

(a) Patentee Tuohy did not invent the corneal type contact lens.

(b) The patent in suit fails to disclose anything requiring the exercise of inventive genius.

(c) The claims of the patent in suit fail to describe the alleged invention in the clear and definite manner required by the statute.

(d) A method invention cannot be validly patented by an article patent.

Point 2: THIS IS NOT A CASE IN WHICH AN AWARD OF ATTORNEYS' FEES IS PROPER, EVEN IF IT SHOULD BE FOUND THAT PLAINTIFF IS ENTITLED TO PREVAIL.

Point 3: IT IS SUBMITTED THAT THE TRIAL COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT DEFENDANTS' MOTION FOR NEW TRIAL UPON THE GROUND OF NEWLY DISCOVERED EVIDENCE.

Point 4: THE TRIAL COURT ERRED IN HOLDING THAT A PURELY DESCRIPTIVE WORD CONSTITUTES A TRADE-MARK.

(a) The terms "corneal lens" and "cornea lens" are merely descriptive of corneal lenses.

(b) The trial court was without jurisdiction to determine the issue of infringement of an alleged common-law trade-mark in the absence of diversity of citizenship of the parties.

ARGUMENT.

POINT I.

The Patent in Suit, Its Prosecution Before the Patent Office, and the Prior Art.

(a) Patentee Tuohy Did Not Invent the Corneal Type Contact Lens.

In applying for his patent, Mr. Tuohy claimed to be the inventor of the corneal type contact lens. For instance, claim numbered 7 of his application as filed, read:

“7. A contact lens applicable to the cornea of the human eye consisting of a generally convex section of transparent or semi-transparent material and characterized by being disposed wholly within the limbus of the eye to which it is applicable.” [Ex. 2, p. 10.]

However, in its first action [Ex. 2, p. 13], the Patent Office rejected the claims upon the above mentioned Obrig book,* the pertinent excerpt from which is quoted at page 15 of Exhibit 2, as follows:

“About the same time that August Muller was experimenting with contact lenses, an optician, E. Kalt, independently carried on an investigation of his own. He ground some small lenses to correct keratoconus *which had no scleral band, and rested at the edge of the cornea. They were designed to exert some pressure on the apex of the conus* in an attempt to reduce the ecstasia as well as to correct the visual error.”

Mr. Tuohy then acquiesced in the rejection by the Patent Office by canceling his claims [Ex. 2, p. 87]. He thus

*The book was not entered as a separate exhibit because the most pertinent part, that describing the Kalt lens, was quoted as a part of the file history of the Tuohy patent, Ex. 2 [R. 185].

admitted that the corneal type lens was old and is estopped to assert otherwise.

Exhibit Supply Co. v. Ace Patents Corp., 315 U. S. 126, 86 L. Ed. 736;

American Can Co. v. M. J. B. Co. (9th Cir.), 48 F. 2d 144, 146.

The Patent Office suggested to Mr. Tuohy that, if he had invented anything, it was a method of fitting an old corneal lens on the eye, and suggested that he refile his application as one for a method patent [Ex. 2, p. 89]. Mr. Tuohy did not refile his application as suggested, but inserted, by amendment, two *method* claims [see claims numbered 11 and 12, Ex. 2, p. 88], which the Patent Office rejected for lack of sufficient disclosure in the specification [Ex. 2, p. 94]. Mr. Tuohy then acquiesced in this rejection by canceling those claims [Ex. 2, p. 97].

However, Mr. Tuohy, by having his attorney personally interview the Patent Office Examiner, finally persuaded the Examiner to allow the two claims of the patent. While those claims are *article* claims, they recite as their alleged novelty, a *method* or technique of fitting a lens on an eye.

Claim 1 of the patent [R. 239] reads as follows:

“1. A contact lens applicable to the human eye comprising a concavo-convex lens formed of light-transmitting material having a marginal size smaller than the limbus portion of the eye to which it is applicable but larger than the maximum iris opening, said lens having a radius of curvature on its concave side slightly greater than the radius of curvature of the cornea to which it is applied so that radially from the center of the lens there will be a small but gradually increasing clearance for the entry of natural eye

fluids between the lens and the cornea, said lens being ground to correct for visual deficiency.”

Claim 2 is essentially the same except that it specifies that the edge of the lens is beveled, to make it smoother.

Thus, if we eliminate from the claims, as we must, the statement of the function of the lens, the only physical structure which it describes is “a concavo-convex lens formed of light transmitting material.”

(b) The Patent in Suit Fails to Disclose Anything Requiring the Exercise of Inventive Genius.

Corneal lens structure as described by the Tuohy patent claims was old, as shown by the description of the Kalt lens in the Obrig book; by the lenses made by Dr. Green in 1946 [Ex. 3. R. 149]; by the description of the “Gualdi” lens in the publication “The Optician” [Ex. I, R. 255]; and by the corneal portions of the contact lenses of the Lincke patent 2,000,768 [Ex. G, R. 248], and the Volle patent 722,059 [Ex. H; R. 251]. Tuohy also acquiesced in the holding of the Patent Office that the structure was old.

The necessity for having clearance between the lens and the eye to allow for the eye fluids was recognized by all opticians [See Ex. I; R. 255].

The alleged novelty in the Tuohy patent claims is the recital that the lens so fits the cornea that a fluid space is provided—or, in the language of the patent, “so that radially from the center of the lens there will be a *small* but gradually increasing clearance for the entry of natural eye fluids between the lens and the cornea.” However, all alleged novelty in that is negated by the Kalt lens described in the above-mentioned Obrig book. Kalt tried

his corneal lens upon an eye afflicted with keratoconus (an eye affliction in which the cornea has an acutely conical shape [R. 219]), in an attempt to reduce the ecstasia of the keratoconus. The lens was so shaped that it exerted its pressure on the apex of the cone, so that it had to have a radius larger than that of the cornea onto which it was fitted. While the Kalt lens described in the Obrig book did not reduce the ecstasia of the keratoconus, it was also ground to correct vision deficiencies, and, as a prior publication, the Obrig book describes a corneal lens for vision correction, which is the only purpose of the Tuohy lens.

Tuohy was employed by Obrig when the latter published the description of the Kalt lens in 1942 [R. 61]. Then, six years later, after leaving Obrig's employ, Mr. Tuohy filed application for the patent in suit, claiming as his own invention that which Obrig had described, except that Tuohy couched his patent application in more technical language.

Even if we disregard the fact that the Kalt lens was designed to fit the eye in the same manner as the Tuohy lens, with all the above discussed art before him Mr. Tuohy certainly was not called upon to exercise any flash of genius to make his lens flare outwardly from the apex of the cornea to provide a fluid clearance.

As a matter of fact, the Tuohy patent specification does not treat the particular manner of providing this clearance as of any great moment. For instance, in his patent, page 3, column 1, lines 63 *et seq.*, he states that the mere grinding of the lens for optical correction may provide the necessary clearance for the eye fluids.

Beveling the edges of an article, to make it smooth, is a conventional procedure in all arts. In any event [Ex.

J; R. 264], shows contact lenses having beveled and rounded edges. Consequently claim 2 of the Tuohy patent is also fully met.

Thus, according to the tests of invention laid down by the Supreme Court in *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84, 86 L. Ed. 58, and applied by this court, Mr. Tuohy has failed to make a patentable invention.

(c) The Claims of the Patent in Suit Fail to Describe the Alleged Invention in the Clear and Definite Manner Required by the Statute.

35 U. S. C. A. 33 provides as follows:

“Before any inventor or discoverer shall receive a patent for his invention or discovery he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, *in such full, clear, concise, and exact terms* as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall *particularly point out and distinctly claim* the part, improvement, or combination which he claims as his invention or discovery.”

It will be recalled that the Tuohy patent claims, after reciting an old concavo-convex transparent lens of the corneal type (of a size to fit the limbus portion of the eye),

attempt to distinguish by reciting that the lens has a radius of curvature “slightly” greater than that of the cornea

“to which it is to be applied so that radially from the center of the lens there will be a ‘small’ but gradually increasing clearance for the entry of natural eye fluids between the lens and cornea.”

It is apparent, therefore, that, before any manufacturer of corneal lenses could form an opinion as to whether a given lens is within the Touhy patent claims, he would have to follow the lens through the oculist into the hands of the patient upon whom it was eventually fitted, and then measure the patient’s eye to determine its curvature. He would then have to form an opinion as to whether the lens was only “slightly” greater in curvature than the radius of curvature of the eye; and he would also have to form an opinion as to whether or not there was a “small” clearance, and whether the clearance was such that the eye fluids could effectively enter between the lens and cornea, or whether the clearance was too great to enable the lens to be held in position by surface tension with the eye fluids. The patent claims do not recite, *except in terms of function*, what clearance there should be, but leaves that to experimentation. Even after making all those experiments and forming all those conclusions, the result would not be conclusive, because human eyes undergo changes in shape from time to time. A particular lens upon a particular patient might be an infringement today but tomorrow it might not be, and vice versa—not because of any act of the manufacturer, but because of acts of nature.

According to the testimony of plaintiff's expert [R. 215] this clearance is a critical matter. The expert testified that if there is too much clearance, the lens is apt to fall off the eye. He also testified that an improperly fitted Tuohy lens would injure the eye. *This the patent claims leave this critical matter to experimentation and conjecture, describing it only in terms of function.*

In other words, a lens manufacturer would not only have to consult a patent lawyer, but also an eye doctor, to obtain an opinion as to whether a particular lens infringed the patent, and even that opinion would be debatable as well as temporary.

The patent statute has never contemplated that there should be such uncertainty, or that a manufacturer should be required to conduct experiments and draw conclusions therefrom as to whether his product infringes a patent.

In *Standard Oil Co. v. Tide Water Associated Oil Co.*, 154 F. 2d 579, a case involving patent claims of this type, the court said (pp. 582-583):

"The public policy of §4888 has been clearly expressed by the Supreme Court. 'The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others, and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must "inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not." The claims "measure the invention." . . .

In a limited field the variant must be clearly defined.’ *General Electric Co. v. Wabash Appliance Corp., et al.*, 1938, 304 U. S. 364, 369, 58 S. Ct. 899, 902, 82 L. Ed. 1402. The same language is used in *United Carbon Co. et al. v. Binney & Smith Co.*, 1942, 317 U. S. 228, 232, 63 S. Ct. 165, 168, 87 L. Ed. 232. The latter decision goes on to point out that ‘The courts . . . no less than the parties-litigant, need and may insist upon the precision enjoined by the statute.’ The public policy behind the statute may be seen to be as strongly grounded in the necessity for adequate notice as it is in the necessity to teach. The burden is on the inventor to say precisely what he has done. He must speak so clearly that he does not shift that burden to others who because of his failure to be more explicit may unwittingly invade the field covered by the patentee.

“The most immediate test of sufficiency of precision in description following from the policy just outlined is that no inventor may compel independent experimentation by others to ascertain the bounds of his claims. This Court in the *Standard Brands* case so ruled before and the Supreme Court in the same case agreed. Equally necessary in derivation is the rule that difficulty in securing exactness does not mean a description may fall short of the requirements of the statute. In the *General Electric* case, *supra*, the Supreme Court said, ‘The Circuit Court of Appeals below suggested that “in view of the difficulty, if not impossibility of describing adequately a number of microscopic and heterogeneous shapes of crystals, it may be . . . the best disclosure possible . . .” But congress requires, for the protection of the public, that the inventor set out a definite limitation of his patent; that condition must be satisfied before the monopoly is granted.’ ”

In *Vitamin Technologists v. Wisconsin Alumni Research Foundation* (9th Cir.), 146 F. 2d 941, in discussing such claims, this court said (pp. 949-50):

“Assuming that Dr. Steenbock made a novel discovery of process and product, the discoveries, however valuable, do not automatically become patented by the filing of applications disclosing them. In addition to the disclosure, the applicant must ‘particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention and discovery’ as required by 35 U. S. C. A. §33. In *United Carbon Co. v. Binney & Smith*, 317 U. S. 228, 63 S. Ct. 165, 87 L. Ed. 232, in holding invalid a claim because of the indefiniteness of the area of infringement, the Supreme Court followed *General Electric Co. v. Appliance Wabash Corp.*, 304 U. S. 364, 369, 58 S. Ct. 899, 901, 82 L. Ed. 1402, which there states:

“‘. . . Patents, whether basic or for improvements, must comply accurately and precisely with the statutory requirements as to claims of invention or discovery. The limits of a patent must be known for the protection of the patentee, the encouragement of the inventive genius of others, and the assurance that the subject of the patent will be dedicated ultimately to the public. The statute seeks to guard against unreasonable advantages to the patentee and disadvantages to others arising from uncertainty as to their rights. The inventor must “inform the public during the life of the patent of the limits of the monopoly asserted, so that it may be known which features may be safely used or manufactured without a license and which may not.” The claims “measure the invention.”’

“Appellant contends, and we agree with it, that the phrase of all the claims of the first and second

patents, describing the function of exposure as ‘for a period *sufficient* to effect antirachitic activation but so limited as to avoid subsequent *substantial injury* to the antirachitic principle,’ is too vague and uncertain a description of the process to ‘inform the public . . . of the limits of the monopoly asserted.’”

In *In re Statmann*, 146 F. 2d 290, the Court of Customs and Patent Appeals, in holding that a patent claiming structure must distinguish over the prior art in terms of structure rather than in terms of function or method, stated (p. 292):

“ . . . the statement in the claims as to the method of applying the caps is entirely functional and, since the claims are not drawn to method but to structure, in order to be patentable they must distinguish from the prior art by structural limitations. This principle is so elementary that it is not necessary to cite authorities.”

(d) A Method Invention Cannot Be Validly Patented by an Article Patent.

Under the patent statute, a machine, an article of manufacture, or a composition of matter, is a “thing” and may be protected by an *article* patent. But a method or process is fundamentally different and may only be protected by a *method* patent.

Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650.

A controlling consideration here is that the Tuohy patent is an article patent, and yet, at the very point which Tuohy asserts that there is novelty, he claims his alleged invention in terms of method, or the function which the

lens is to perform. Even if Mr. Tuohy had disclosed anything novel in the method of fitting a corneal lens upon an eye (and any such novelty is negated by the O'Brien book), still he cannot validly monopolize it by an article patent.

A leading case directly in point is *Nestle-Le Mur Co. v. Eugene*, 55 F. 2d 854 (6th Cir.), which fully reviews the authorities in point. There the patentee had discovered, in the permanent waving of hair, that it was advantageous to apply the heat for a longer period near the roots of the hair. The court observed that perhaps the method was new but that the patentee had elected to patent the machine, which was not new, instead of patenting the method, saying:

“ . . . Having discovered a new and useful method, which we assume was patentable as such . . . , a machine patent was applied for and issued upon an unpatentable device. This was an error in judgment and administration for which the courts cannot and should not afford a remedy.”

In holding the patent invalid, the court further said:

“ . . . little prejudice could result from an inventor's indecision as to whether his invention should properly be the subject of a patent for a machine or an article of manufacture, or a composition of matter. These three subjects of patent are in a true sense all products or articles, but all differ fundamentally in nature from a process. Cf. *Burr v. Duryee*, 1 Wall. 531, 568, 17 L. Ed. 650. The latter is not a ‘thing.’ It may be protected and patented only as a process, and failure to observe this distinction is here fatal.”

POINT II.

This Is Not a Case in Which an Award of Attorneys' Fees Is Proper, Even if It Should Be Found That Plaintiff Is Entitled to Prevail.

Patentee Tuohy entered the corneal lens field and applied for his patent in 1948.

The uncontradicted and corroborated [R. 190] evidence shows that the defendant, Dr. Green, who also owns the corporate defendant, commenced his work in corneal lenses in 1946, at which time he made and used corneal lenses [Ex. 3] by taking old scleral contact lenses and cutting off the scleral flange [R. 135]. Consequently, it is obvious that Dr. Green did not enter the field with any knowledge of any patent of Mr. Tuohy.

There is no evidence that at any time Mr. Tuohy or the plaintiff notified defendants of the patent in suit either before or after it issued on June 6, 1950, and this suit was instituted shortly thereafter, in October, 1950.

It is true that Dr. Green purchased some of the Tuohy lenses in 1949, after plaintiff commenced offering them to the public, and plaintiff handed Dr. Green some of its literature; but the literature was also handed to others in the profession and of course was not of a confidential nature.

It is believed to be the policy of the courts, certainly in this circuit, not to award attorneys' fees as a general thing, but only where wilful conduct or bad faith is shown. (*Dubil v. Rayford Camp Co.*, 184 F. 2d 899 (9th Cir.)) There is no showing of wilful conduct or bad faith warranting any award of attorneys' fees in this case.

POINT III.

It Is Submitted That the Trial Court Abused Its Discretion in Refusing to Grant Defendants' Motion for New Trial Upon the Ground of Newly Discovered Evidence.

Since corneal lenses had their origin in Europe, it was impossible for defendants, despite diligent effort, to locate, in time for the trial of this case, users of those corneal lenses which were exported to and used in this country years ago.

However, as shown by the affidavits of Dr. Green [R. 28] and Dr. Peter C. Kronfeld [R. 30], attached to the motion for new trial [R. 24], defendants did discover after the trial, some of those lenses, the users thereof, and additional illuminating facts about the history of the lenses. Another thing discovered by defendants after the trial was a publication, "The Ophthalmic Dispenser," attached as Exhibit "B" to the motion for new trial [R. 32]. While this publication, in itself, was not early enough to be anticipatory of the Tuohy patent, it does contain an article written prior to issuance of the Tuohy patent, by one of the pioneers in the contact lens field, giving a chronological history of corneal lenses, and from which defendants would have been able to locate important evidence.

It is submitted that, particularly in a case like this, where an individual, by a patent of highly questionable validity, is attempting to appropriate the techniques gradually developed in the profession over the years, the trial court should have allowed ample opportunity to the defendants to place the full history of the art before the court. By denying defendants' motion for new trial, the trial court denied this right to defendants.

POINT IV.

The Trial Court Erred in Holding That a Purely Descriptive Word Constitutes a Trade-mark.

(a) The Terms “Corneal Lens” and “Cornea Lens” Are Merely Descriptive of Corneal Lenses.

While the complaint alleges [R. 4], that plaintiff has some trade-mark right in the term “corneal lens,” and while the trial court has attributed to the term a trade-mark significance, it appears too obvious to admit of such argument that the term is purely descriptive and, consequently, is incapable of constituting a trade-mark.

Webster's New International Dictionary lists “cornea” as a noun and “corneal” as the adjective. Throughout the record, in describing the lenses involved, all witnesses have necessarily had to refer to them as corneal lenses, because that is the only manner in which they can be described.

There is no evidence establishing any secondary meaning of the term. In fact, the only testimony as to plaintiff's use of the term appears at R. 110, where plaintiff's witness Mr. Gordon testified as follows:

“We are *trying* to establish the words ‘corneal lenses’ as our trade-mark for our brand of contact lenses. We have an application for federal registration of the words ‘corneal lenses’ and ‘Tuohy corneal lenses’ now pending.”

There is no showing that the trade-mark was ever registered.

The findings of fact certainly do not support a judgment to the effect that “corneal lenses” constitutes a trade-mark or has acquired any secondary meaning. Finding 13 [R. 17] contains the only thing in the findings about the subject. It reads as follows:

“The plaintiff, both before and since the issuance of the patent in suit has been exploiting the patented lenses by manufacturing, using, and selling the same under the names of ‘Corneal Lens’ and ‘Tuohy Corneal Lens’ and includes among purchasers of its lenses departments of the Government of the United States.”

The law is well settled that no one may prevent another from using a common, descriptive dictionary word to describe his product.

“A name which is merely descriptive of the ingredients, qualities, or characteristics of an article of trade cannot be appropriated as a trade-mark and the exclusive use of it afforded legal protection. The use of a similar name by another to truthfully describe his own product does not constitute a legal or moral wrong, even if its effect be to cause the public to mistake the origin or ownership of the product. *Delaware & H. Canal Co. v. Clark*, 13 Wall. 311, 323, 327, 20 L. Ed. 581, 583, 584; *Standard Paint Co. v. Trinidad Asphalt Mfg. Co.*, 220 U. S. 446, 453, 55 L. Ed. 536, 540, 31 Sup. Ct. Rep. 456; *Howe Scale Co. v. Wyckoff, Seamans & Benedict*, 198 U. S. 118, 140, 49 L. Ed. 972, 986, 25 Sup. Ct. Rep. 609.”

Warner & Co. v. Lilly & Co., 68 L. Ed. 1161, 1163.

(b) The Trial Court Was Without Jurisdiction to Determine the Issue of Infringement of an Alleged Common Law Trade-mark in the Absence of Diversity of Citizenship of the Parties.

There is no diversity of citizenship of the parties [R. 21], and, even if the term “corneal lens” could be said to have the status of a valid trade-mark, it has not been registered and would therefore constitute only a common law trade-mark.

In *Dubil v. Rayford Camp Co.*, 184 F. 2d 899, 901, this court considered similar facts and held that the issue of a common law trade-mark was a non-federal cause of action and that the trial court was in error in entering judgment upon the issue, citing *Hurn v. Oursler*, 289 U. S. 238, 77 L. Ed. 1148.

Conclusion.

For the reasons hereinbefore stated, defendants respectfully submit, therefore, that the judgment appealed from should be reversed and plaintiff’s complaint dismissed; or, at least, that the case should be remanded to the trial court with directions to hear the newly discovered evidence and then to enter new findings, conclusions and judgment.

Respectfully submitted,

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No. 13333

In the
United States
Court of Appeals
for the Ninth Circuit.

PACIFIC CONTACT LABORATOR-
IES, INC., MORRIS GREEN and
LEE W. HOGGAN,

Appellants,

vs.

SOLEX LABORATORIES, INC.,

Appellee.

Appellee's Reply Brief

FILED

SEP 11 1952

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vs.

SOLEX LABORATORIES, INC.,

Appellee.

No. 13333

Appellee's Reply Brief

I.

STATEMENT

This is primarily a patent infringement suit on a patent dealing with contact lenses applicable to the human eye.

Prior to the development of the invention disclosed in the patent, contact lenses for use on the human eye had been developed. These almost universally had a central portion overlying the cornea of the eye either in contact therewith or spaced forwardly therefrom,

and had integral scleral flanges that extended beyond the limbus (the margin between the colored iris and the white of the eye). Such integral flanges were designed to overlie the sclera (white of the eye) to hold the central or corneal portion over the cornea.

The presence of these scleral flanges made such contact lenses very difficult to fit. Also as they pressed on the sclera and covered the sclera to a large extent they tended to shut off the natural blood supply to the eye as well as deprive the eye of natural eye fluids and the supply of oxygen available from the air. Consequently, it was necessary to use in conjunction therewith a buffer solution compatible with the tissues of the patient. The difficulties involved with the use of the buffer solution are acknowledged in defendants' Ex. I (R. 257). Even then the average patient could only tolerate wearing the lenses for approximately four hours (R. 63, 64).

The patentee proposed an entirely different approach to a solution of this problem. He proposed eliminating the scleral flange entirely and manufacturing a contact lens which would cover the cornea only. In addition thereto, the patentee's lens was to have a radius of curvature slightly greater than the radius of curvature of the patient's cornea. As set forth in the patent (R. 242):

“ . . . if the radius of curvature of the cornea measures 7.8 millimeters the radius of curvature of the concave side of the lens need only be 7.9 or possibly 8.0 millimeters.”

This increase would, of course, vary slightly with various radii of curvature of the cornea of different patients.

The result is that pressure on the sclera of the eye is entirely eliminated. The sclera at all times is exposed to the atmosphere the same as in the normal eye. The use of a buffer solution is entirely eliminated and due to the clearance between the lens and the cornea, the natural eye fluids may flow between the lens and the cornea and constantly replace themselves. The remarkable part of this lens is that, although it is larger or flatter than the cornea, that it remains attached to the eye probably by capillary action and that it does not slide to the bottom of the eye and remain there. Although there may be temporary displacements from the cornea subsequent blinking of the eyelids causes the lens to re-center itself with respect to the cornea whenever such a temporary displacement occurs.

The bevelling of the inside marginal edge of the lens is not simply for the purpose of smoothing, as appellants insinuate, pages 10 and 11 of their brief. As set forth in the patent the bevel is for the purpose of facilitating the passage of the edge of the lens over the protruding limbus when the lens is temporarily displaced from its central position over the cornea. The bevelling also facilitates the entry of the tears behind the lens. It should be observed in this connection that claim 2 recites that the bevelling is on the inside edge of the lens. If the sole purpose was to round off or smooth the edges of the lens, the bevel would be placed on the outside edge of the lens where

it would be engaged by the eyelids closing over the lens in the course of blinking.

That the development of such a lens was unobvious to those skilled in the art is demonstrated by the fact that when the patentee submitted his proposal to an eye specialist, Maurice W. Nugent, Nugent

“told him that it was a wonderful theory but I didn’t think it would work, and Mr. Tuohy then informed me that he was wearing the lenses” (R. 209, 210).

It is also demonstrated by the fact that the Examiner of the Tuohy application in the Patent Office also expressed doubt as to the operability of this lens until a demonstration was made on an Associate Examiner (R. 81 to 83). That the lens has subsequently been favorably received by the profession and the trade generally, see Ex. 7, a scrapbook kept by the patentee of publicity pertaining to the patented lens. The United States Government itself, after thorough investigation, has purchased these lenses (R. 79).

The defendant Green became acquainted with the existence of the patented lenses and became a customer of the plaintiff (R. 83). He was fitted with these lenses and took training from the plaintiff in the fitting of these lenses (R. 84). He signed a request for the plaintiff’s manual, Ex. 9, and in response thereto he was supplied with Ex. 8. He engaged the defendant Hoggan, a former employee of the plaintiff (R. 85) and proceeded to infringe the patent in suit.

The plaintiff adopted and used in connection with its lenses the terms “Corneal” and “Tuohy Corneal” (R. 87). The defendant Green, in exploiting his infringing lenses, advertises that his lenses are “Cornea” lenses (R. 113, see Ex. 12).

The appellants in their specification of errors (appellants’ brief, page 5) do not dispute the question of infringement, if appellee’s patent is valid. Their attack is directed primarily against the validity of the patent. They challenge the validity of the patent on three grounds:

- 1) Lack of patentable invention (appellants’ brief, p. 9).

- 2) The claims do not define “the alleged invention in the clear and definite manner required by the statute” (appellants’ brief, p. 11).

- 3) That the invention resided in the method of fitting and not in the article (appellants’ brief, p. 16).

II.

THE QUESTION OF INVENTION IS A QUESTION OF FACT AND IS NOT TO BE DISTURBED ON APPEAL IF SUPPORTED BY ANY SUBSTANTIAL EVIDENCE OR UNLESS IT IS CLEARLY ERRONEOUS, RULE 52(a).

This Court has stated many times in patent cases that the question of invention is a question of fact and that the Trial Court's finding of invention will not be disturbed upon appeal if supported by any substantial evidence, unless it is clearly erroneous.

Ralph N. Brodie v. Hydraulic Press, 151 F. (2d) 91 (C.A. 9);

Maulsby v. Conzevoy, 161 F. (2d) 165 (C.A. 9);

Refrigerating Engineering v. York, 168 F. (2d) (C. A. 9) 896;

Helbush v. Finkle, 170 F. (2d) (C.A. 9);

Faulkner v. Gibbs, 170 F. (2d) 34 (C.A. 9), affirmed 338 U. S. 267;

Lane-Wells v. Johnson, 181 F. (2d) 707 (C.A. 9).

In the present case the Trial Court has found (R. 17):

“12. The patent in suit is for an invention that is a definite advance in the art of contact lenses.”

The Trial Court also found (R. 17):

“15. The patented lens is not anticipated by any prior patent or printed publication or any

prior knowledge or public use of any prior invention pleaded in the defendants' answer, including 'Contact lenses' by Theo E. Obrig, pp. 370, 373, 1942 edition; pp. 129-130, 1947 edition.

Obrig Laboratories.

Dr. Morris Green.

U. S. Letters Patent No. 722,059, Volle, March 3, 1903.

U. S. Letters Pat. No. 2,000,768, Lincke, May 7, 1937.

.
 'The Design of Contact Lenses,' by Vincent Hill, published in The Optician May 23, 1947, pp. 335, 336, 337, and 341."

Despite this finding the appellants assert at page 9 of their brief

"Corneal lens structure as described by the Tuohy patent claims was old, as shown by the description of the Kalt lens in the Obrig book; by the lenses made by Dr. Green in 1946 (Ex. 3, R. 149); by the description of the 'Gualdi' lens in the publication 'The Optician' (Ex. I, R. 255); and by the corneal portions of the contact lens of the Lincke patent 2,000,768 (Ex. G, R. 248), and the Volle patent 722,059 (Ex. H; R. 251)."

All of these references are file wrapper references cited by the Examiner during the course of the prosecution of the application for the patent in suit before the Patent Office. They have consequently been already twice reviewed; once by the Examiner and once by the District Court. In what manner the Examiner

was in error or the District Court was in error in holding that these references did not anticipate, the appellants do not set forth in their brief. They do make some discussion of the description of the Kalt lens described in the Obrig book and purport to quote therefrom on page 7 of their brief. However, their quotation from the Obrig book deletes the last and highly significant statement. The entire quotation reads as follows and the matter deleted by the appellant is underscored:

“E. Kalt

“About the same time that August Muller was experimenting with contact lenses, an optician, E. Kalt, independently carried on an investigation of his own. He ground some small lenses to correct keratoconus which had no scleral band, and rested at the edge of the cornea. They were designed to exert some pressure on the apex of the conus in an attempt to reduce the ecstasia as well as to correct the visual error. As might be expected, they were unsuccessful.”

It requires no citation of authority to the effect that a mere unsuccessful abandoned experiment will not anticipate a validly issued patent. Manifestly, a printed description of an unsuccessful abandoned experiment is of no greater anticipatory effect than the abandoned experiment itself.

The situation here is somewhat similar to that in *Balaban et al v. Polyfoto Corporation*, 47 F. Supp. 472:

“The process described in the Burrows & Colton publication is open to the same distinction as pointed out in respect of the Wilson and Snapp patents. In addition to that, as the Burrows & Colton disclosure is merely a publication, it is discredited under the rule that an inoperative device (and the evidence shows that the device was inoperative) disclosed in a printed publication cannot anticipate a later operative device. *Permutit Co. v. Harvey Laundry Co.*, 279 F. 713, 719 (C. C. A. 2).”

See also, *United Chromium, Incorporated v. Great Lakes Plating & Japanning Co.*, 43 U.S.P.Q. 439:

“THE SARGENT ARTICLE AS AN ANTICIPATION

“Sargent taught that trivalent chromium of chromic sulphate was the essential thing. Sargent did not teach that acid radicals were the important things that needed to be controlled. Accordingly, he did not teach that the radicals function as the catalyst or that their concentration should bear ratio to the chromic acid concentration within defined limits. Sargent’s suggestions as to the regulation of the bath for continuous operation were erroneous. He did not know or teach that the catalyst acid radicals and their ratio to the chromic acid concentration were the critical elements.

“An important consideration in connection with the Sargent article is that qualified men who followed Sargent’s teachings failed.

“The Court concludes that the Sargent article did not anticipate the disclosure in the bath patent.”

In the present case it is obvious from the disclosure in the Obrig book itself that the Kalt lenses were unsuccessful. One reason that they were unsuccessful is that they were designed for the particular purpose of correcting keratoconus, an unusual situation. Secondly, they were unsuccessful because they “*rested at the edge of the cornea.*” This is directly opposed to the teachings of the patent in suit which specify that the lens shall be flatter than the cornea so that there will be a space between the edge of the lens and the edge of the cornea or limbus. This space prevents the patented lens from *resting* “at the edge of the cornea”.

There is, therefore, no error on the part of the Examiner or on the part of the District Court in throwing out the Obrig book as an anticipation.

The other references referred to on page 9 of appellants' brief are not even discussed. The Gualdi lens referred to in Ex. I (R. 255) makes no disclosure of eliminating the scleral flange. Ex. I describes the Gualdi lens as one

“which has one continuous curve, thus fitting on the eyeball very much as an upturned cup fits on an upturned saucer.”

At R. 256, Gualdi's lens is described as eliminating “the scleral *radius.*” Apparently therefore Gualdi had

a scleral flange but either made it flat without a radius instead of with a radius, or made it of the same radius as that of the portion that overlay the cornea. Certainly, there is no clear disclosure in Ex. I of how to make the patentee's lens with all of its characteristic limitations. In fact, this exhibit is but a discussion of the difficulties involved in making scleral-type contact lenses, which difficulties are eliminated by the invention of the patent in suit.

The Lincke Patent No. 2,000,768 (R. 248) is but a disclosure of a method of making the scleral type contact lenses having flanges integral with the corneal surface *c* referred to as "peripheral sclerotic part *d*." (R. 250, colum 2, line 13.) There is no disclosure in this patent of eliminating or omitting the scleral flange.

The Volle Patent No. 722,059 (R. 251) likewise does not disclose eliminating the scleral flange. The drawing clearly shows the lens extending over the entire front portion of the eye including the sclera and extending beneath the eyelids.

There is likewise no disclosure in any of the references of making the lens of greater radius of curvature than that of the cornea.

The appellants seem to rather reluctantly concede on page 3 of their brief that the lenses disclosed in the Volle patent and in the Lincke patent both include the integral scleral flanges that overlies the sclera. These flanges, the patentee Tuohy, intentionally omits to

gain the advantages of (1) leaving the sclera exposed to atmosphere, (2) avoiding the attendant pressure which retards the blood supply, and (3) obtaining the distribution of tears through contact of the lids with the sclera.

It is also contended by the appellants that despite the defendant Green's interest in the plaintiff's lenses, his solicitation of the plaintiff's manual, and his receipt of training in the fitting of the lenses that nevertheless the defendant Green made the same type of lens in 1946, by trimming the scleral flanges from some scleral-type lenses (appellants' brief, page 3). The Trial Court must have rejected his testimony to this effect and found to the contrary in finding 15 (R. 17). Proof of such prior invention by the defendant Green beyond a reasonable doubt was required.

Hoeltke v. Kemp, 80 F. (2d) 912 (C.C.A. 4);
Adamson v. Gilliland, 242 U. S. 350.

The impossibility of Green's story that he merely took some conventional scleral-type lenses and merely trimmed off their scleral flanges is established by the testimony of Tuohy (R. 227-229) wherein he asserts that lenses so prepared could not be seen through by the patient without further alteration.

The appellants assert at page 11 of their brief that the patentee, Tuohy, has failed to make a patentable invention under the "flash of genius" decision of *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U. S. 84. However, in the concurring opinion of Mr.

Justice Douglas and Mr. Justice Black in *Great Atlantic & Pacific Tea Co. v. Supermarket Equipment Corp.*, 340 U. S. 147, it is stated:

“ . . . An invention need not be as startling as an atomic bomb to be patentable. But it has to be of such quality and distinction that masters of the scientific field in which it falls will recognize it as an advance.”

That the patentee's invention meets this requirement is established by the recognition given thereto in the scrapbook, Ex. 7. The Trial Court, in its memorandum opinion (R. 11), said:

“ . . . I realize that the patent is limited in its scope but I feel that the patent involved was and is a definite advance in the art of contact lenses.”

Finding 12 (R. 17) is made to this effect. This finding is well supported by the evidence and is very far from being “clearly erroneous”.

Even the defendants, themselves, in their instruction manual, Ex. 13, make an acknowledgement that the Tuohy lens was a definite advance in the art. The following is quoted therefrom:

“In 1948 Dr. Morris W. Nugent, M.D., of Los Angeles, who had acted as ophthalmologic consultant in the development and trial of corneal lenses which were supplied to him by Mr. Kevin Tuohy of the Solex Laboratories, presented his first report on his experiences with corneal lenses. The results were so impressive and the publicity

given was so favorable that a great interest was immediately aroused throughout the country, as well as in foreign lands, for further trial. . . .

“In a second report given by Dr. Nugent in 1949, the larger series of patients who have been successfully fitted has definitely established the corneal contact lens as an invaluable adjunct in the correction of defective vision.”

III.

THE CONTENTIONS OF THE APPELLANTS THAT THE CLAIMS OF THE PATENT IN SUIT FAIL TO DESCRIBE THE ALLEGED INVENTION IN THE CLEAR AND DEFINITE MANNER REQUIRED BY R. S. 4888 AND THAT THE INVENTION SHOULD HAVE BEEN PROTECTED BY A METHOD PATENT RATHER THAN AN ARTICLE PATENT CANNOT BE RAISED FOR THE FIRST TIME ON APPEAL.

The defense that the claims are not sufficiently definite as presented at pages 11 *et seq.* of appellants' brief and the contention that Tuohy's invention should have been protected by a method patent and not an article patent, were not pleaded in the defendants' answer. These issues were not raised during the trial and no testimony concerning them was taken during the trial. The contentions were not asserted in briefing the case before the Lower Court and no decision or ruling was made thereon in the Lower Court's memorandum opinion. Likewise, no findings were made on either of these contentions.

These contentions were first injected into the case on the defendants' motion for a new trial (R. 24). The motion for a new trial was denied (R. 39).

Rule 8(c) of the *Federal Rules of Civil Procedure* provides:

“In pleading to a preceding pleading, a party shall set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense.”

Rule 12(h) of the *Federal Rules of Civil Procedure* provides:

“A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, . . .” (With certain exceptions not applicable here.)

It is well settled that a contention or argument which is not presented before the Trial Court cannot be raised for the first time on appeal. *Johns & Johns Printing Company v. Paull-Pioneer Music Corporation*, 102 F. (2d) 282 (C.C.A. 8):

“The contention that the plaintiff's copyright on the song ‘The Sidewalks of New York’ is invalid and void was not raised in the lower court. The plaintiff's ownership of the copyright was admitted by stipulation. It is, therefore, too late to raise that question in this court. *Hall v. Aetna Life Ins. Co.*, 8 Cir., 36 F. 2d 171; *Brown v. Gurney*, 201 U. S. 184.”

The Patent and Licensing Corporation v. Olsen, 188 F. (2d) 522, (C.A. 2):

“Olsen’s argument that the patents in question are saved from assignment by the exception to clause 1 (b) which makes it unnecessary for Olsen to assign inventions on improvements of patents licensed under clause 2 (a) was not raised in the trial court. It cannot be raised here.”

Cold Metal Process Co. v. McLouth Steel Corp., 170 F. (2d) 369, (C.A. 6):

“McLouth urges that the Agreement was unlawful and unenforceable (1) because of a provision therein which, it asserts, required it as licensee, to purchase only from the patentee unpatented parts of the assembly claimed to be covered by the patent and (2) because of a provision which, it asserts, prohibited it from selling or alienating the patented mills to which it claimed it had absolute title.

“These considerations were not, as Cold Metal points out, brought to the attention of the District Court and were not advanced as grounds for the appeal, other than under the general point that the license agreements were valid. The appellant cannot be permitted to raise for the first time on appeal questions which if raised below might have been met by the other side. *Ford Motor Co. v. Chas. A. Myers*, 64 F. 2d 942, 944 (C.C.A. 6).”

Container Patents Corp. v. Stant, 143 F. (2d) 170 (C.A. 7):

“As to this defense, it is sufficient to say that it was not presented to the court below and it cannot be presented here for the first time. *New York Life Ins. Co. v. Calhoun*, 114 F. 2d 526, 543, *Ramming Real Estate Co. v. United States*, 112 F. 2d 892; *Hutchinson v. Fidelity Investment Association*, 106 F. 2d 431, 436; *Towle v. Pullen*, 238 F. 107, 111. The only places in the record where the point is mentioned are the opening statement of counsel, the objections to the master’s report (which could not have considered the issue at all), and the statement of point to be urged on appeal. None of these references seems to us to have adequately presented the issue to the trial court.”

Brown v. Warner, 173 F. (2d) 162 (C.A. 5):

“We agree with appellee that the defense of illegality, unsupported as it is by either pleading or proof, was not made out below, and may not be urged here.”

The appellants in arguing these contentions in effect are proceeding as if the motion for new trial wherein they were first raised had been granted. Had the motion for a new trial been granted, these contentions would have been thoroughly litigated in the Lower Court and a ruling as well as findings thereon would have been made from which an appeal might be taken. However, the motion for new trial was denied, and as these questions were not tendered during the trial, it is unfair to the appellees to now be confronted with a contention on which they have had no oppor-

tunity to be heard in the Trial Court, and on which they have had no opportunity to present evidence. It is respectfully submitted that in view of the state of the record it is now too late for the appellants to assert these contentions here.

IV.

THE CLAIMS OF THE PATENT IN SUIT ARE NOT INDEFINITE

If it is proper for this Court to consider appellants' present contention that the claims are indefinite in spite of the fact that this contention was not raised in the court below, except in defendants' motion for a new trial, it is respectfully submitted that the claims are sufficiently definite to comply with the terms of the statute. *H. H. Robertson Co. v. Klauer Manufacturing Company*, 98 F. (2d) 150 (C.C.A. 8):

“The argument is that the patent does not define ‘substantial’ or ‘substantial space’ so that such space could be ascertained therefrom by one skilled in the art. While the statute (35 U.S.C.A., Section 33) requires ‘such full, clear, concise, and exact terms as to enable any person skilled in the art . . . to make, construct, compound and use the same’ yet ‘A limited use of terms of effect or result, which accurately define the essential qualities of a product to one skilled in the art, may in some instances be permissible and even desirable’ (*General Elec. Co. v. Wabash Appliance Corp.*, 304 U. S. 364). Here the space is hardly capable of

mathematical determination and definition since that space is largely dependent upon the relativity of the education pipe, the storm band and the cap and such relativity must be applied to ventilators of varying size. None the less, the drawing (Fig. 2) and the specifications indicate the thought by the lines 21, 41 and 42 and the specifications (p. 2, ll. 120-128) further explain the thought by relative measurements as follows:

‘In practice a highly efficient ventilator has been made in which the storm band 13 has a diameter equal to 1.92 of the diameter of the eduction pipe, and the lower edge or rim of the cap member has a diameter equal to 1.33 of the diameter of the eduction pipe and is separated from the latter by a distance which is equal to .584 of the diameter of the eduction pipe.

‘While it may be preferred to maintain this relation between the size of the storm band and cap member to the eduction pipe, it is not desired to limit the invention in this respect.’

“Such disclosures are sufficient.”

In comparison with the facts of the above case, the claims of the patent in suit specify that the lens has

“a radius of curvature on its concave side slightly greater than the radius of curvature of the cornea to which it is applied so that radially from the center of the lens there will be a small but gradually increasing clearance for the entry of natural eye fluids between the lens and the cornea.”

An example of what is meant by the term "slightly" is given in the specification (R. 242):

"These clearances need not be great and, for example, if the radius of curvature of the cornea measures 7.8 millimeters the radius of curvature of the concave side of the lens need only be 7.9 or possibly 8.0 millimeters."

In a situation such as is presented in the present case, it is impossible to define the relationship between the curvature on the back of the lens and the curvature of the cornea with mathematical certainty. The radius of curvature of the cornea with different individuals varies. Even with the same individual, the radius of curvature on a given eye may be different when measured on vertical and horizontal meridians. Thus, in the order sent by the witness Lionel Lewis to the defendants to have filled the prescription for the right eye had a radius of curvature (when converted to diopters) of 45 measured on the vertical meridian and 47.79 when measured on the horizontal meridian. In the case of the left eye, the radius of curvature in diopters measured vertically was 45.00 and when measured horizontally 48.00 (R. 51, 52). This was an actual prescription of a patient (R. 54). Under such circumstances, it is impossible to set up an exact mathematical relationship. Variations in the human eye are too great. But the patent does teach that a fundamental and necessary characteristic of the lens is that it shall have a radius of curvature greater than that of the cornea but only a slight amount greater. The lens is not satisfactory

when the radius of curvature of the lens is exactly equal to that of the cornea and it likewise is not satisfactory when the lens has a radius of curvature smaller than that of the cornea (R. 214).

35 U.S.C.A., Sec. 33, while it requires that the applicant “particularly point out and distinctly claim,” does not demand the impossible of the inventor. *Chicago Pneumatic Tool Company v. Hughes Tool Co.*, 97 F. (2d) 945 (C.A. 10):

“There is one further contention in respect to infringement. It relates to the width and depth of the spaces between the rows of teeth. The patent teaches in language too clear for doubt that the spaces shall be wide and deep in order to provide ample clearance. There was no necessity for such an arrangement when pyramidal teeth were in use; but it is essential with long, narrow, chisel-shaped, deep penetrating teeth. The accused assembly discloses wide and deep spacing with ample clearance, which comes well within the coverage of the patent.

“The patent is challenged on the ground of generality for failure to furnish a yardstick with which to determine the meaning of ‘long,’ ‘narrow’ or ‘thin’ teeth. The contention does not require extended discussion. It is difficult, if not impossible, to state in general terms an abstract rule by which to test objectionable indefiniteness or generality in a patent. Each case must be determined in large measure by its own facts. This patent is in a well known and crowded art; and the speci-

fications and drawings throw significant light upon the meaning with which the words are used. When the prior art, the specifications, and the drawings are taken into consideration in connection with the claims, the patent is not open to the objection of being too indefinite or general to disclose how the invention may be put to use and how infringement may be avoided. *Eibel Process Co. v. Minnesota and Ontario Paper Co.*, 261 U. S. 45; *Vacuum Cleaner Co. v. Innovation Electric Co.*, 239 F. 543.”

Paul E. Hawkinson Co. v. Wilcoxon, 149 F. (2d) 471 (C.A. 6):

“The District Court held that the claims in issue, to-wit, Claim #1 of the apparatus patent and Claims 1 and 6 of the method patent were invalid because Hawkinson did not ‘particularly point out and distinctly claim the part, improvement or combination, which he claims as his invention. . . .’ See Title 35, Ch. 2, Sec. 33 U.S.C.A. We cannot agree with this conclusion. The claims of a patent are always to be interpreted in the light of its specifications and drawings. This canon of construction is as old as the patent law itself and finds its latest pronouncement in *Schriber Co. v. Cleveland Trust Co.*, 311 U. S. 211, 217 . . .

“In determining the sufficiency of these patents the real test is, whether the disclosures in the specifications and claims make the inventions clear to a mechanic skilled in the art of tire retreading so that he could construct the apparatus

and practice the method. *Eibel Co. v. Paper Co.*, 261 U. S. 45, 65. That this was done is conclusively shown by the tremendous success of the patents, not only in this country, but throughout the British Empire.

“As indicated at the outset, we have not been aided in our examination of the record either by brief or by argument of counsel for appellee, but we find nothing that indicates a fatal lack of compliance with Title 35, Ch. 2, Sec. 33 U.S.C.A. The presumptions of validity arising from the grants are not negatived. We are not authorized to strike down a patent for uncertainty and indefiniteness where a reasonable construction of the specifications and claims will protect the invention. *Cleveland Automatic Mech. Co. v. Natl. Acme Co.*, 52 F. 2d 769, 771 (C.C.A. 6). Laying to one side any other construction, we are reasonably satisfied that the patents here involved are sufficiently described and claimed.”

The claims of the patent in suit, of necessity, define the article with relation to the cornea of the wearer. This is a variable. It has been held, however, that it is proper to define a structure with relation to parts of the human body, see *Ex parte Jones*, 84 U.S.P.Q. 24, a decision of the Board of Appeals of the United States Patent Office:

“ . . . The claims were rejected on the grounds that they are deemed informal and indefinite. The basis for this position is that the claims recite the relation of many of the parts to each other through

their relation to the patient's head, neck, face, or body . . . We have examined the claims with care and we notice that it is sufficient to define the relation of the various parts if it be assumed that the head and neck of a human being defines a line passing centrally through the head and neck. With this line or axis established for reference, the location of the various parts of applicant's clamps referred to in the claims may be established. This mode of definition is not as convenient to follow as one which is confined to the geometry of the clamp itself. However, it has long been the practice in the Patent Office, as will be seen by reference to the patents called to our attention by appellant, to permit devices for application to anatomy to be referred to normal anatomy to assist in defining the orientation of the parts. We cannot say that this is improper. Admittedly, directions and distances are not precisely determined in this matter (*sic*, probably manner), but this art does not ordinarily require the same precision as the machine tool art for example."

Here, the patentee has but followed well-established Patent Office practice in defining his lens by orienting it with respect to the cornea to which it is to be applied.

V.

THE INVENTION HERE RESIDED IN THE ARTICLE AND NOT IN THE METHOD OF FITTING.

The case of *Nestle-LeMur Company v. Eugene, Ltd.*, 55 F. (2d) 854, relied upon by appellants (appellants' brief, p. 17) is not in point.

Assuming for purposes of argument that the appellants can now raise the question for the first time on appeal that the Tuohy invention should have been patented as a method patent rather than an article patent, it is respectfully submitted that the invention resided in the article and not in the method and that the patent was properly issued.

As above pointed out, the Tuohy lens is a new and different article of manufacture from any similar article of manufacture heretofore devised. It differs from an ordinary watch crystal in that it has an optical correction ground thereon to correct for the visual deficiency of the wearer. It has a diameter smaller than the limbus but larger than the maximum iris opening of the wearer. In this respect it differed from all contact lenses having scleral flanges. It differed from the Kalt lens described in the Obrig book in that, instead of resting "at the edge of the cornea" it was flatter than the cornea so that its margins adjacent the edge of the cornea were spaced therefrom by the clearance referred to in the claims. These fundamental differences in the characteristics of the Tuohy lens

make it a success as contrasted with the prior scleral-type lenses and as contrasted with the "unsuccessful" Kalt lens. There was here a new article of manufacture and the invention resided in discovering that a combination of these characteristics produced a successful contact lens.

Defendants-appellants contend at pages 16 *et seq.* of their brief that the invention should have been patented as a method patent and not as an article patent. What the method would be, or how it would be defined, defendants-appellants do not undertake to assert. In fact, at the top of page 17 of their brief they deny that there is any novelty in the method of fitting the corneal lens upon an eye.

Appellants assert that the case of *Nestle-LeMur Company v. Eugene, supra*, supports their position. In that case,

" . . . The patentee is said to have discovered that, since the hair is coarser and more abundant near the roots, that portion requires heating for a longer period than nearer the tips, where it is finer and more easily injured by excessive heat."

The invention of the patentee in that case, if any, therefore resided in the method of permanent waving which consisted of applying the heat for a longer period of time to the hair near the roots than near the tips.

Usually, a method may be performed by a number of different pieces or types of apparatus. The per-

formance of the method is generally independent of the particular apparatus used to perform it. For example, in the *Nestle-LeMur* case, the heating of the hair near the roots for a longer period of time than near the tips could have been performed by any one of a large number of possible heaters. Even a sad iron-type of hair curler could have been applied for a longer period of time to the hair adjacent to the roots and a second sad iron heater could have been applied to the hair near the tips for a shorter period of time. Steam heaters could have been employed and various other pieces of apparatus could likewise have been used to carry out the method. The method of heating the hair near the roots for a longer period of time than near the tips was independent of the specific apparatus employed. The patentee, Suter, however, instead of recognizing that the invention, if any, resided in the method undertook to patent a particular form of electric heating apparatus for carrying out the method. In so doing he merely

“duplicated the electric stoves or heaters in common use (see patents to Grosert and Unger, No. 1,103,506, and to Kremer, No. 1,164,102), and connected the electric circuit in parallel to the resistance or heating coils, so that by the operation of a switch the current to the upper or outer heater could be connected or disconnected at will.”

The Court held, and properly so, that there was no invention involved in merely duplicating the well-known heaters and connecting them to a common

switch, and that the invention, if any, resided in the method rather than in the apparatus.

In contrast with the *Nestle-LeMur* case, there is here no invention in any method. The method of applying the lens to the eye or its removal therefrom is the same method as the method employed in prior contact lenses except that the use of the buffer solution is omitted. The method of measuring the cornea of the eye is acknowledged in the patent itself to be old, see R. 242, column 4, wherein it is stated:

“The corneal portion of the eye can then be measured both horizontally and vertically by any conventional measuring instrument used for this purpose.”

The prescription of the wearer “can be determined in the usual manner.”

The novelty here, therefore, did not reside in the method of refracting the patient's eyes to determine his prescription or the method of measuring the cornea or in the method of applying and removing the lens. Likewise, it did not reside in the method of manufacturing the lens. The lens can be ground in any one of a number of conventional manners.

The invention here did not reside in a method as in the *Nestle-LeMur* case, but resided in the article which was different from all prior known contact lenses. This article was different when properly oriented and measured with respect to the eye to which it was ultimately to be applied. The *Nestle-LeMur* case is consequently not in point.

VI.

**THE AWARD OF ATTORNEY'S FEES IS PROPER
AND SHOULD BE INCREASED BY THIS
COURT IN DEFENDING THIS APPEAL.**

The award of attorney's fees is discretionary with the Trial Court. In the present case the Trial Court, in its memorandum opinion, stated:

“Counsel for the defendant appears critical of the court's inquiry relative to the matter of attorney's fees. He must have been aware of the fact that if the court held the patent valid, the court would of necessity have to hold that the infringement was both deliberate and wilful, and I so find.” (R. 12.)

Obviously, this is true. The defendants infringed after the Defendant Green and the Defendant Hoggan learned all they could from the plaintiff as to the construction, fitting, and general know-how attendant the most advantageous use of the plaintiff's lenses. When the defendants undertook to infringe they advertised in a manner unethical in ophthalmological circles, and, in so doing, advertised their lenses using the terms “Cornea” and “New Cornea”.

In *Dubil v. Camp*, 184 F. 2d 899, C. A. 9, the same case referred to by appellants in their brief, this court said:

“It is not the duty of the reviewing court to interfere with the exercise of the discretionary power confided to the trial courts by Congress to

award attorney's fees in proper cases except where there is an abuse of discretion amounting to caprice or an erroneous conception of law on the part of the trial judge."

No such showing of an abuse of discretion is made by the appellants here.

The allowance of attorney's fees by the Trial Court is gratifying but hardly adequate to reimburse the plaintiff in this suit, and it is certainly not adequate to reimburse the plaintiff in defending this appeal. Consequently, this Court is requested to make its own allowance of attorney's fees for the defense of this appeal.

VII.

THERE WAS NO ABUSE OF DISCRETION IN REFUSING TO GRANT DEFENDANT'S MOTION FOR A NEW TRIAL.

Appellants, in their brief, make no showing amounting to an abuse of discretion on the part of the trial court in refusing to grant defendant's motion for a new trial. The appellants, in such motion, made no showing of any facts from which the court may infer reasonable diligence. In *Marshall's U. S. Auto Supply v. Cashman*, 111 F. (2d) 140, C. A. 10, the court said:

“A motion for new trial on the ground of newly discovered evidence must show that the evidence was discovered since the trial; *must show facts from which the court may infer reasonable diligence on the part of the movant*; must show that the evidence is not merely cumulative or impeaching; must show that it is material; and must show that it is of such character that on a new trial such evidence will probably produce a different result. *Praisament v. United States*, 5 Cir., 96 F. (2d) 865.”

Where there is a want of diligence in discovering any evidence, a new trial will be denied. *Aladdin Manufacturing Co. v. Mantel Lamp Co. of America*, (C.A. 7) 116 F. (2d) 708.

As to the reference made to The Ophthalmic Dispenser for May, 1950, this article appears to be nothing more than a hearsay document. Its publication did

precede the issue date of the patent by just one month. It was not published prior to the filing date of the patent in suit and consequently could have no bearing upon the validity of the patent. *Petition of Weltzien*, 68 F. Supp. 1000, 10 Fed. Rul. Serv. 1013, 1016:

“It has been held that the affidavit of a party or his attorney as to what a witness will testify to is hearsay and insufficient to support a motion for a new trial. *Collins v. Central Fruit Co. of Rochester*, 135 Misc. 465, 238 N.Y.S. 226.”

As to the affidavit of Dr. Peter C. Kronfeld, this affidavit cannot be reconciled with his statements made in a discussion following the second report on the Tuohy corneal lens delivered at the Thirty-third Annual Meeting of Pacific Coast Ophthalmological Society. A reprint of the second report on the Tuohy corneal lens is included in the plaintiff's scrapbook, Exhibit 7. At page 10 of the report under the heading “Discussion,” Dr. Kronfeld of Chicago, Illinois, made the following statement:

“I haven't tried any of these lenses, but I am impressed with the results presented here today.

“About eighteen years or twenty years ago, we used in our retinal detachment work a forerunner of this lens to keep the cornea clear. I don't remember who devised that lens, but it was made of glass and obtained from Zeiss in Germany. I convinced myself at that time that such a lens could stay with the patient's cornea during the entire operation. Later on we modified our detachment

technique and it became unnecessary to protect the cornea by means of a lens. We learned to hide the cornea under the conjunctival flap or under one lid, upper or lower, whenever possible.

“Just for my own information, I would like very much to know what success has been obtained in patients who really benefit from a contact lens. It doesn’t make so very much difference whether or not a myope of three or four diopters can wear a contact lens. To a person with myopia from 18-25 diopters, however, it means a great deal to see with a contact lens instead of the ordinary minus lens. I would like to know how those people, as well as people with corneal scars, do with the new lens.

“I would also like to hear a more specific statement about the incidence of corneal edema. Apparently it doesn’t happen as often as with regular type contact lenses, but perhaps the statement of Dr. Nugent could be made more specific for my own enlightenment.”

If the Kronfeld lens used by him in his operation work had the same characteristics of being ground to correct for visual deficiency and of being smaller than the limbus but larger than the largest iris opening and had an internal radius of curvature slightly greater than the curvature of the cornea, Kronfeld would not have stated in the discussion following the second report on the Tuohy corneal lens, “I haven’t tried any of these lenses.” Likewise he would not have asked for the additional information which he solicited, as

above quoted, if he had a lens that met the terms of the claims of the patent in suit and had used the lens in a manner contemplated by the patent. He would have had such information available to him and there would have been no occasion for him to ask for it.

It is therefore submitted that the trial court did not abuse its discretion in refusing to grant a new trial. No adequate showing of diligence was made and even the evidence produced in support of the petition for a new trial was not of such a character that it was likely to have brought about a change of decision.

VIII.

THE TRIAL COURT DID NOT ERR ON THE ISSUE
OF UNFAIR COMPETITION

In the memorandum opinion (R. 12-13) the Trial Court said:

“I also find in favor of the plaintiff *on the issue of unfair competition*. I do not believe the shortening of the word ‘corneal’ to ‘cornea’ is sufficient. The use of the two words would certainly cause confusion with the general public.”

Appellants contend at pages 20 and 21 of their brief that the words “corneal lens” are descriptive and consequently are incapable of constituting a technical trade-mark. However, whether the word “corneal” constitutes a technical trade-mark or is susceptible of exclusive appropriation, is immaterial insofar as unfair competition is concerned. In *Lane Bryant, Inc. v. Maternity Lane Ltd.*, 173 F. (2d) 559 (C.A. 9) this Court said:

“That the words and phrases used in common by both parties are common expressions in general use is not an absolute defense to charges of unfair trade practice, is well established. The principle is exceptionally well stated in *Banzhaf et al v. Chase*, 150 Cal. 180, 182, wherein the defendant was enjoined from selling bread under the name ‘New Homestead’, the plaintiff having sold bread for many years under the name ‘Old Homestead’: ‘The words “Old Homestead,” or “homestead,”

may, and perhaps do, suggest that the bread on which they appear is asserted to be similar to that made in the ordinary old homestead. . . . But we may concede that the words are descriptive in character and relate to quality, and hence that, under section 991 of the (California) Civil Code, they cannot be appropriated by any person as his own, so as to give him a right to prevent their use by another to his injury, regardless of the motives or purposes of the other in so using them.' See the *Modesto Creamery v. Stanislaus Creamery Co. et al.*, 168 Cal. 289, wherein butter was labeled 'Modesto'."

Nims, Unfair Competition and Trade-Marks, 4th edition, pages 66 and 67:

"The user of trade insignia may not exclude others from employing common words and devices in their usual significance. His legal right is limited to prohibiting their fraudulent use. Yet this limited right, under modern conditions, is of great value.

.

"Nevertheless, unfair competition actions often are distinguished from actions of trade-mark infringement on the grounds that they involve no proprietary interest in the words or devices in question.

"In *Shaver v. Heller*, it was held that suits for infringements of trade-marks rest upon ownership of the trade-marks, whereas suits for unfair competition are founded upon the damage caused by

the fraudulent passing off of the goods of one manufacturer for those of another; that in suits for trade-mark infringement title to the trade-mark is indispensable to a good cause of action, but that in suits for unfair competition 'no proprietary interest in the words, names or means by which the fraud is perpetrated is requisite to maintain a suit to enjoin it. It is sufficient that the complainant is entitled to the custom—the good-will—of a business and that this good-will is injured, or is about to be injured, by the palming off of the goods of another as his.' ”

In the present case the defendant, Morris Green, purchased lenses from the plaintiff Solex (R. 112). The trade names “Tuohy Corneal Lens” or “Corneal Lens” appeared on all of the plaintiff’s packages (R. 110). Defendant, Morris Green, proceeded to advertise the lenses that he purchased from plaintiff, Solex, in the newspapers (R. 112). He was asked to stop but refused to do so. Thereafter, he proceeded to manufacture and place on the market the infringing lenses and advertise the infringing lenses as being new “cornea” lenses, plaintiff’s Ex. 12.

By purchasing the plaintiff’s lenses under the names of “Corneal Lenses” and “Tuohy Corneal Lenses,” advertising them as corneal lenses in endeavoring to re-sell them, then manufacturing the infringing article and advertising the infringing article as the “New Cornea Lens”, the appellants are, in effect, demanding the right to continue to perpetrate a fraud on the public.

While the defendant Green was purchasing the plaintiff's lenses under the names "Corneal Lens" and "Tuohy Corneal Lens" and reselling them to the public, the public was led to believe that they were purchasing the plaintiff's lenses and that the defendant was but a distributor thereof. But when the defendant Green undertook to manufacture his own lenses and to sell them under the name "Cornea Lens" or "New Cornea Lens" he was attempting to take advantage of the good will developed for the plaintiff's lenses. The purchasing public was expected by the defendant Green to assume that the defendant's lenses purchased from him were the same lenses as those which Green had previously been purchasing and reselling and which were of the plaintiff's manufacture. This constitutes unfair competition.

As to jurisdiction of the claim of unfair competition, jurisdiction is conferred under the provisions of Sec. 1338(b) of 28 U.S.C.A. Certainly, the manner in which these defendants-appellants have been infringing the plaintiff's patent is a "substantial and related" claim to the patent infringement issue.

IX.

CONCLUSION

There is no reversible error in this record. Substituted counsel sought to re-litigate this case before the Trial Court. His motion for a new trial was denied (R. 39). Having been thus denied a new trial, he seeks to re-litigate the matter here as if this appeal were a trial *de novo*. The Federal Rules of Civil Procedure, however, require this Court to regard findings of fact of invention and of infringement, reversible only where such findings are clearly erroneous. This is not the situation presented on this record.

It is respectfully submitted that the Lower Court should be affirmed.

Respectfully submitted,

FRED H. MILLER, ESQ.

Attorney for Appellee.

No. 13333.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC CONTACT LABORATORIES, INC., MORRIS GREEN
and LEE W. HOGGAN,

Appellants,

vs.

SOLEX LABORATORIES, INC.,

Appellee.

APPELLANTS' REPLY BRIEF.

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No. 13333.
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

PACIFIC CONTACT LABORATORIES, INC., MORRIS GREEN
and LEE W. HOGGAN,

Appellants,

vs.

SOLEX LABORATORIES, INC.,

Appellee.

APPELLANTS' REPLY BRIEF.

Appellants make the following reply to appellee's reply brief.

I.

**The Kalt Corneal Lenses Described in the Obrig Book
Were Not Unsuccessful for Their Normal Purpose of Correcting Visual Error.**

The normal purpose of the Kalt corneal lenses described in the Obrig book was, of course, to correct deficiencies in vision. However, as the Obrig book relates, Kalt also experimented with them in an attempt to use them to reduce the ecstasia of a keratoconus eye affliction, which experiment was described as unsuccessful. The book states:

“They were designed to exert some pressure on the apex of the conus in an attempt to reduce the ecstasia *as well as to correct the visual error.*”

The Obrig book says nothing about the lenses having been unsuccessful to correct visual error. *Consequently, the book must stand as a prior published description of a contact lens which had no scleral band*, so that it only fitted over the cornea; and it must stand as a description of a lens of that character which was of greater curvature than the cornea onto which it was fitted, as otherwise it would not have exerted pressure “on the apex of the conus.” Therefore, appellee’s argument that the Kalt lenses were an unsuccessful experiment is without merit insofar as the value of the Obrig book as a prior publication of the teachings of the Tuohy patent is concerned.

It may be that patentee Tuohy is entitled to some credit for the energy which he devoted to bringing the old Kalt lens before the profession (although he did not represent it to be the work of Kalt), but Tuohy must seek his reward, if any, in some channel other than that provided by the patent statute for inventors.

II.

Appellee Is Estopped to Assert That Tuohy Was the First to Eliminate the Scleral Band of a Contact Lens.

Appellee’s brief appears to argue that Tuohy originated the idea of eliminating the scleral band from contact lenses. However, as pointed out under Point I of appellants’ opening brief, during prosecution of the application for the Tuohy patent, Mr. Tuohy acquiesced in the position of the Patent Office that the Kalt lens described in the Obrig book anticipated the idea of eliminating the scleral band. Consequently, according to the doctrine of “file wrapper estoppel,” appellee may not be heard to assert the contrary.

III.

This Court, as Guardian of the Public Interest in Matters Involving Patents, Should Consider Important Defenses Whether or Not They Were Raised in the Court Below.

Appellee's brief argues that since the issue of whether the Tuohy patent claims comply with Revised Statutes 4888 was not raised until the motion for new trial, this Court may not consider the issue on appeal. However, it has frequently been held that the appellate courts, as guardians of the public interest, should consider important defenses in patent cases even though they were not raised in the lower court.

Muncie Gear Works v. Outboard M. & Mfg. Co.,
315 U. S. 759, 766, 86 L. Ed. 1171;

Nachman Spring-Filled Corp. v. Kay Mfg. Co.,
139 F. 2d 781 (2d Cir.).

IV.

The Tuohy Patent Claims Are Fatally Indefinite.

The Tuohy patent attempts to cover, in rather indefinite language, a corneal lens which is of larger curvature than that of the cornea of the human eye onto which it is eventually to be fitted.

By analogy, one might discover that if one wears a shoe larger than his foot he will not have corns. If such a person could be said to have invented anything, it could only be a method of fitting a shoe on a foot. Certainly he could not, by obtaining an article patent on a shoe larger than the foot of the wearer, place upon shoe makers the burden of following their product through the marketplace and onto the human feet of the eventual purchasers

of the shoes, to determine how the shoes fit. That is precisely the burden which Tuohy is attempting to place upon contact lens makers.

V.

No One Can Be a Wilful Infringer of a Patent of Which He Had No Knowledge and Which Had Not Even Been Applied for When He Commenced His Accused Acts.

In their opening brief, appellants pointed out that, when they commenced making the accused lenses, plaintiff had no patent, and had not even applied for a patent, and that at no time prior to suit (which was filed immediately after issue of the patent) were the defendants notified of the plaintiff's patent. *Appellee has failed to refute or answer that fact.* Therefore, it can hardly be said that the defendants wilfully infringed a patent which did not exist and had not been applied for when they commenced their accused activities. Nor can it be fairly said that defendants' acts in continuing to make the accused lenses after issuance of the patent were in bad faith, when they were never notified of the patent and when they were sued within a few days after issuance of the patent.

Even after issue, if a defendant feels, as do these defendants, that a patent is invalid, the only way in which he can test its validity is to infringe it and invite suit.

“ . . . It is only by becoming an infringer that one gains opportunity to assail a patent in his own interest and that of the public.”

United States Gypsum Co. v. Consolidated Expanded Metal Companies, 130 F. 2d 888, 890 (6th Cir.).

Conclusion.

Wherefore, appellants again submit that the judgment below should be reversed and plaintiff's complaint dismissed.

Respectfully submitted,

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

Attorneys for Defendants-Appellants.

No. 13333

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC CONTACT LABORATORIES, INC., MORRIS GREEN,
and LEE W. HOGGAN,

Appellants,

vs.

SOLEX LABORATORIES, INC.,

Appellee.

APPELLANTS' PETITION FOR REHEARING
EN BANC.

FILED

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No. 13333

IN THE

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FOR THE NINTH CIRCUIT

PACIFIC CONTACT LABORATORIES, INC., MORRIS GREEN,
and LEE W. HOGGAN,

Appellants,

vs.

SOLEX LABORATORIES, INC.,

Appellee.

APPELLANTS' PETITION FOR REHEARING EN BANC.

Believing that the questions presented are of sufficient importance to justify the request, appellants respectfully petition the Court, in the exercise of its discretion, to grant a rehearing *en banc*. The questions presented are:

I.

Where a Serious Infirmary Appears Upon the Face of a Patent Sued Upon, May, and Should Not, an Appellate Court Consider the Infirmary on Appeal, Even Though It Was Not Urged at the Trial?

The United States Supreme Court has answered this question in the affirmative, in *Muncie Gear Works v. Outboard, M. & Mfg. Co.*, 315 U. S. 759, 86 L. Ed. 1171, as follows:

“We think the conclusion is inescapable that there was public use, or sale, of devices embodying the

asserted invention, more than two years before it was first presented to the Patent Office. We are not foreclosed from a decision under §4886 on the point by the obscurity of its presentation in the courts below. This issue has been fully presented to this Court by the petition for a writ of certiorari, and in subsequent briefs and argument; and there is not the slightest indication that respondents have been prejudiced by such obscurity. To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently presented but so seldom adequately represented in patent litigation.”

Although this Court has held that questions *requiring the hearing of testimony* cannot be considered on appeal unless they were considered below,¹ it has not, insofar as appellants have been able to determine, definitely passed upon the question of whether infirmities appearing *upon the face* of a patent in suit may be considered on appeal when they were not urged below.

However, in the instant case, without ruling as to whether it had a right to consider the questions *sua sponte*, this Court declined to consider the following points raised on appeal but not urged at the trial:

(a) That the Tuohy patent in suit is invalid because, as appears upon its face, its *claims* fail to particularly point out and distinctly describe the part, improvement or combination which the patent seeks to monopolize,² a

¹*Baker v. Dean*, 80 F. 2d 658, 660; *Oxnard Cannery, Inc. v. Bradley*, 194 F. 2d 655, 656.

²Appellants' Opening Brief, Point I(c), pp. 11-16.

requirement expressly held by this Court to be essential in *Vitamin Technologists v. Wisconsin Alumni Research Foundation*, 146 F. 2d 941;

(b) That the Tuohy patent in suit is invalid because, although it is an *article* patent, its claims attempt to define the subject-matter of the monopoly in terms of the *method* by which the lenses are fitted on the eyes of the ultimate purchaser,³ condemned in *Burr v. Duryee*, 1 Wall. 531, 17 L. Ed. 650, and *Nestle-Le Mur Co. v. Eugene*, 55 F. 2d 854 (6th Cir.).

While it is true that those points are “technical,” they go to the very fundamentals of a patent, and are expressly required not only by the former patent statute, 35 U. S. C. A. 33, but also by the new patent statute, 35 U. S. C. A. 112.

II.

Isn't a Patentee in an Infringement Action, Estopped to Assert a Position Which He Voluntarily Surrendered During Prosecution of the Patent Application Before the Commissioner of Patents?

The courts have uniformly answered this question in the affirmative.⁴ However, in arriving at its decision in this case, the Court erroneously accorded to patentee Tuohy the status of inventor of the corneal type contact lens, despite the fact, as pointed out in appellants' opening brief,⁵ that Tuohy voluntarily surrendered that position during prosecution of his patent application before the Commissioner of Patents.

³Appellants' Opening Brief, Point I(d), pp. 16-17.

⁴*Keith v. Charles E. Hires Co., Inc.*, 116 F. 2d 46 (2nd Cir.).

⁵Appellants' Opening Brief, Point I(a), p. 7.

III.

**Does the New Patent Act Effect a Change Over the
Prior Patent Statute With Respect to Award of
Attorney's Fees?**

This question has not yet been determined by the courts.

In the instant case, the court held the new patent statute to be controlling but affirmed the award of attorney's fees of \$500.00, without ruling, and in the absence of any finding, as to whether or not this is an "exceptional" case.

The former patent statute, 35 U. S. C. A. 70, contained the following provision relating to attorney's fees.

"The Court may in its discretion award reasonable attorney's fees to the prevailing party upon the entry of judgment on any patent case."

The new patent statute, 35 U. S. C. A. 285, however, provides as follows:

"The Court in exceptional cases may award reasonable attorney's fees to the prevailing party."

Appellants submit that, in enacting the new patent act, it was the intention of Congress to limit the cases in which attorney's fees are allowable to those in which the losing party is guilty of "exceptional" bad faith. As pointed out in appellants' opening brief,⁶ in the instant case the defendants commenced the alleged infringement *even before the patent in suit was applied for* and the suit was filed shortly after issuance of the patent. Believing the patent to be invalid, appellants continued the alleged infringement after the suit was filed.

⁶Appellants' Opening Brief, Point II, p. 18.

For the guidance of the lower courts, it is important that this Court construe the meaning of the word “exceptional” as used in the new patent statute. It hardly appears probable that the instant case is exceptional. If it were, no one would be able to challenge validity of a patent which he believes to be invalid, without risking the penalty of paying the patentee’s attorney’s fees.

IV.

Does the Patent Statute Authorize an Appellate Court to Award Attorney’s Fees on Appeal in Addition to Those Awarded by the Trial Court?

Without discussing whether or not it had a statutory right to do so, this Court awarded appellee \$250.00, as attorney’s fees *on appeal*, in addition to the attorney’s fees awarded by the trial court.

The cases appear to be silent on the point. The former patent statute, 35 U. S. C. A. 70, quoted above, only provided for award of attorney’s fees “upon entry of judgment,” which words were omitted from the new statute.

Generally, since award of attorney’s fees to a successful litigant is contrary to sound public policy,⁷ any authority for such an award must be derived from statute or from contract, and such statutes must be strictly construed. Therefore it appears questionable whether the patent statute authorizes any award of attorney’s fees on appeal.

Wherefore, appellants submit that this petition should be granted, not only to correct what appellants believe

⁷*Oelrichs v. Williams*, 82 U. S. 211, 21 L. Ed. 43.

to be an injustice, but also for the purpose of providing guidance for the lower courts and patent litigants in future actions.

Respectfully submitted,

MASON & GRAHAM,

COLLINS MASON,

WILLIAM R. GRAHAM,

Attorneys for Appellants.

I, Collins Mason, attorney for appellants, petitioners above named, do hereby certify that the foregoing petition for rehearing is in my opinion well founded in law and that it is presented in good faith and not for delay.

COLLINS MASON.

January 6, 1954.

No. 13334

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MERSHON COMPANY, INC.,

Appellant,

vs.

FRANK A. PACHMAYR, and FRANK A. PACHMAYR, doing business under the fictitious firm name and style of PACHMAYR GUN WORKS,

Appellees.

APPELLANT'S OPENING BRIEF.

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No. 13334

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MERSHON COMPANY, INC.,

Appellant,

vs.

FRANK A. PACHMAYR, and FRANK A. PACHMAYR, doing business under the fictitious firm name and style of PACHMAYR GUN WORKS,

Appellees.

APPELLANT'S OPENING BRIEF.

Plaintiff appeals from a final judgment of the United States District Court for the Southern District of California, Central Division (Judge Harrison), in a trademark infringement and unfair competition action.

Hereinafter, plaintiff-appellant, Mershon Company, Inc., is referred to as "plaintiff," and defendant, Frank A. Pachmayr, doing business as Pachmyr Gun Works, is referred to as "defendant."

Jurisdiction.

The appealed judgment was entered on October 22, 1951 [R. 62]. Motion for new trial was filed by plaintiff on October 30, 1951 [R. 63], and was denied on January 4, 1952 [R. 70].

No question of jurisdiction or pleading is raised by this appeal.

Original jurisdiction was conferred upon the court below by 28 U. S. C. A. 1338, and jurisdiction to review the judgment is conferred upon this court by 28 U. S. C. A. 1291.

Statement of Case.

Plaintiff's complaint [R. 5] alleges that plaintiff owns a federally-registered trade-mark [R. 233; Ex. 5] for gun recoil pads. The registered trade-mark is a composite one, consisting of the words "WHITE LINE" and a symbol comprising a *white circular line* encircling the base of the recoil pad. The manner in which the mark appears and is applied to the plaintiff's product is exemplified by Exhibits 3 and 4.

The complaint contains three causes of action; the first being for trade-mark infringement and the second being for unfair competition. The third cause of action, for violation of the anti-trust laws, was dismissed at the trial [R. 225].

Defendant's answer admits using plaintiff's white circular line symbol [Par. III, R. 16], although defendant does not use that part of plaintiff's composite trade-mark consisting of the *words* "WHITE LINE."

Defendant's accused recoil pads are exemplified by Exhibits 8 and 9; being substantially identical in appearance with plaintiff's pads, and being sold in the same stores as plaintiff's pads [R. 100-101], which renders it all the more likely that confusion will result from defendant's use of plaintiff's distinguishing symbol.

The uncontradicted evidence establishes not only actual “passing off” of defendant’s pads for plaintiff’s [R. 137 *et seq.*; Exs. 18-23], but also actual confusion [R. 105; Exs. 12-16]. Even defendant’s own witnesses admitted the likelihood of confusion [R. 221-222]. In fact, at the conclusion of the trial, the trial judge expressed the view that confusion was bound to result from defendant’s use of plaintiff’s white line symbol [R. 194].

Defendant’s answer denies that his use of plaintiff’s white line symbol constitutes either trade-mark infringement or unfair competition; and asserts the affirmative defense that those issues were concluded by a former California Superior Court judgment identified as action No. 520,672 [R. 245].

Although the trial court found in the present action that plaintiff first adopted and used its trade-mark and has spent large sums advertising it [Finding V, R. 50]; that plaintiff registered the mark [Finding VI, R. 51]; that plaintiff has built up and owns and enjoys a valuable business and good will identified by its trade-mark [Finding V, R. 51]; and that dealers have passed off defendant’s recoil pads bearing plaintiff’s white line symbol as plaintiff’s pads [Finding XIV, R. 59], the trial court found that defendant was not guilty of trade-mark infringement or unfair competition. The trial court also concluded that the former judgment is *res judicata* as to the issues of trade-mark infringement and unfair competition here involved.

Inasmuch as the pleadings in the former case are not in evidence and are therefore not before the court, plaintiff will briefly review the facts, which appear from the record.

Some time prior to 1932, defendant was engaged in making and selling gun recoil pads which he identified with the white line symbol here in issue [R. 197]. In 1932, defendant Pachmayr and a Mr. L. E. Mershon (who is now an officer of the plaintiff corporation) formed a partnership known as "Frank A. Pachmayr Co." [R. 78], which partnership carried on said business. In 1935 a corporation was formed under the name "Frank A. Pachmayr Corporation," and that corporation (which, by change of name, is the present plaintiff corporation) succeeded to the business and good will of said copartnership—defendant Pachmayr and Mr. Mershon becoming employees and officers of the corporation [R. 97]. In 1936, defendant Pachmayr resigned from the corporation [R. 97], and entered into an agreement [Ex. H] with the corporation by virtue of which Pachmayr agreed to refrain from reengaging in a competing business for a specified period of some thirty odd months. At the end of said period, Pachmayr reengaged in the business of making and selling recoil pads, but did not mark them with plaintiff's identifying white line symbol.

However, as related in Paragraph III of his answer herein [R. 16], nine years later, in the month of September, 1945, Pachmayr commenced marking his pads with plaintiff's white line symbol. When plaintiff discovered this use, it complained to Pachmayr, and thereupon, in February, 1946, defendant Pachmayr and plaintiff entered into an oral agreement whereby Pachmayr agreed to cease use of plaintiff's white line symbol and

plaintiff agreed that it would not sue him for his past use of it.

Defendant Pachmayr did then, as agreed, cease use of the symbol, but some of his advertising which had already been placed continued to appear [R. 188]. Believing that Pachmayr had violated the agreement, plaintiff sued him in the California Superior Court for his appropriation of the symbol. At the trial, defendant Pachmayr asserted that he had not violated the agreement and that the action was barred thereby; and the Superior Court found accordingly [Finding XI, R. 243], and rendered a judgment of dismissal [R. 245]. That is the judgment which is here asserted to constitute *res judicata* of the present issues.

It might appear from another finding in the prior case, No. XII [R. 243], however, that defendant Pachmayr also asserted an alternative defense in the Superior Court action, to the effect that he commenced use of the white line symbol in 1945 in good faith and had not tried to palm off his pads as plaintiff's, and that, if the action was not barred by the agreement, he was not in any event guilty of unfair competition. It appears from said Finding XII that the Superior Court also found for Pachmayr upon that alternative and inconsistent defense, *although of course it was not material to the judgment*. It is this Finding XII upon which defendant now relies to support his plea of *res judicata*.

Plaintiff appealed the Superior Court judgment to the California District Court of Appeal, whose opinion is

reported at 88 Cal. App. 2d 901. As shown hereinafter, under Point II, *the District Court of Appeal sustained the judgment solely upon the basis of Finding XI*—that the action was barred by the agreement; and expressly held that the other finding [No. XII] was immaterial.

As soon as the Superior Court judgment became final, defendant Pachmayr resumed use of plaintiff's white line symbol, in 1948, making and selling his recoil pads, bearing the symbol, in very large volume [R. 201]; and plaintiff instituted this suit, *which only seeks recovery since Pachmayr resumed the infringement in 1948.*

It is apparent, therefore, that defendant Pachmayr obtained the former judgment upon his representation to the Superior Court that he had abandoned use of plaintiff's white line symbol in good faith as agreed; that as soon as he obtained the judgment, he again began using the symbol; and, now that he has been sued for reappropriating the symbol after obtaining the judgment, he wants to be heard to assert the former judgment as *res judicata*.

Specification of Errors.

Plaintiff contends that the trial court erred:

1. In holding that defendant is not guilty of either trade-mark infringement or unfair competition.
2. In holding that a judgment in a prior California Superior Court action is *res judicata* as to the issues in this case.
3. In adopting findings which are not supported by the evidence.
4. In rendering a judgment which is not supported by the findings.

Summary of Argument.

POINT I.

DEFENDANT IS GUILTY OF TRADE-MARK INFRINGEMENT OR
UNFAIR COMPETITION.

(a) The goods of plaintiff and defendant are identical, are sold in the same stores to the same class of trade, both are marked with plaintiff's distinguishing white line symbol, and the undisputed evidence establishes actual confusion as well as passing off.

(b) To infringe a trade-mark, one does not have to copy the entire trade-mark, if the part which he does copy is enough to lead to confusion.

(c) From the standpoint of infringement or unfair competition, it is immaterial whether or not plaintiff's white line symbol in itself constitutes a valid technical trade-mark.

(d) Where an infringer has copied his competitor's trade-mark and his goods are the same in appearance, the mere fact that the infringer shows his own name upon the product is not sufficient to enable unsuspecting customers to distinguish his product from that of the trade-mark owner.

(e) Trade-marks should be protected not only for the benefit of their owners, but also for protection of the public against having spurious products passed off upon it.

(f) Where a party is associated in business with a trade-mark owner and leaves that association to engage in a competing business, he must exercise great care to distinguish his product from that of the trade-mark owner.

POINT II.

THE FORMER SUPERIOR COURT JUDGMENT IS NOT RES JUDICATA AS TO ANY ISSUE HERE INVOLVED.

(a) Although defendant relies upon the defense of *res judicata*, he has failed to place in evidence enough of the proceedings in the former action to enable the court to determine precisely what issues were concluded by the former judgment.

(b) Where a judgment of dismissal, in a case involving separate alternative defenses, does not reveal upon its face upon which defense it was based, and where the opinion of the reviewing court shows that it was affirmed upon only one of the alternative defenses, if the judgment is asserted in a later action as *res judicata*, it is necessary and proper to construe it in the light of the opinion of the reviewing court to determine what issue it concluded.

(c) A judgment is conclusive only as to those findings which are necessary for its support.

(d) In no event is a former judgment conclusive of subsequent events which create a new legal or equitable situation.

ARGUMENT.

POINT I.

Defendant Is Guilty of Trade-Mark Infringement or Unfair Competition.

- (a) The Goods of Plaintiff and Defendant Are Identical, Are Sold in the Same Stores to the Same Class of Trade, Both Are Marked With Plaintiff's Distinguishing White Line Symbol, and the Undisputed Evidence Establishes Actual Confusion as Well as Passing Off.

A comparison of plaintiff's product [Exs. 3 and 4] with defendant's product [Exs. 8 and 9] convincingly shows that any ordinary customer seeking one of plaintiff's "White Line" recoil pads, would not be able to distinguish the two products. For instance, the following colloquy between the trial judge and one of defendant's witnesses is most pertinent:

"The Court: You are accustomed to handling these.

The Witness: That is right.

The Court: So you would know them by a glance, but suppose you were like myself, not a sportsman, and going hunting for a pad, and you showed me the two, would I readily distinguish the difference by looking at them?

The Witness: Well, not unless—

The Court: You would have to look at the name of the manufacturer and the way they are constructed, and that would be a matter of familiarity with recoil pads, would it not?

The Witness: I guess you are right." [R. 221-222.]

Another of defendant's witnesses, the manager of the sporting goods department of a large Los Angeles de-

partment store, testified [R. 195] that he cautioned his salesmen not to pass off defendant's recoil pads bearing the white line symbol when a customer asked for a "White Line" pad. Obviously, this experienced merchandising man would not have deemed it necessary to so caution his salesmen unless he realized there was serious danger of confusion.

In view of the judgment finally rendered by the trial judge, it is also pertinent to observe that, at the conclusion of the trial, he was apparently convinced that there was definite likelihood of confusion. For instance, see the court's remarks as follows [R. 194]:

"The Court: Go ahead, but I am going to say right now you can look at these two pads, and anybody who was looking for a white line as a distinguishing mark would not be able to tell them apart. These two articles would be confusing. You can look at them and determine that. You can put on all the evidence to the contrary that you want, but the two articles speak louder than any witness has spoken here, so far as I am concerned."

Another important aspect of this case is this: when purchasers are seeking plaintiff's recoil pads, they ask for "White Line" pads [R. 93]. Plaintiff has done extensive advertising featuring the slogan "Look for the White Line" [Ex. 7]. Thus, when defendant places his product in the hands of dealers, conspicuously marked with plaintiff's identifying white line symbol, he is placing in their hands something which they can easily pass off upon an unsuspecting customer who asks for a "White Line" pad. In fact, the uncontradicted evidence shows, and the trial court even found [Finding XIV, R. 59], that many of defendant's dealers who were canvassed have practiced

this method of passing off defendant's pads as plaintiff's. [See the testimony of plaintiff's witness Gnagi, R. 137 *et seq.*]

“ . . . A manufacturer who puts in the hands of his immediate vendee the means of deceiving the consumer, is chargeable with unfair competition. The possibility that the retailer may not be honest in such matters must be taken into account by the manufacturer in selecting his brands.”

Nims on Unfair Competition and Trade Marks,
p. 1214, Sec. 381.

Also, see the uncontradicted evidence of confusion given by plaintiff's witness, Mr. Mershon [R. 104, *et seq.*, Exs. 12-16], to the effect that purchasers of defendant's pads who found them defective have sent them to plaintiff for replacement. This aptly illustrates the extent to which plaintiff's reputation and good will are jeopardized by defendant's use of plaintiff's white line symbol.

Defendant could give no plausible explanation of why he deliberately copied plaintiff's white line symbol. He admitted that he could just as well have used a line of any other color, or no line at all [R. 159]. For several years prior to the fall of 1945, he did not use any line symbol at all [R. 158]; then in 1945 he deliberately started using plaintiff's white line symbol and continued to do so until plaintiff threatened to sue him, at which time, in 1946, he abandoned its use [R. 148]; then in 1948 he again began using plaintiff's white line symbol. Thus, his only purpose in appropriating the symbol is obviously to enable him to trade upon plaintiff's reputation.

As aptly stated by this court in *Del Monte Special Food Co. v. California Packing Corp.*, 34 F. 2d 774, 775:

“ . . . His mark is his authentic seal; by it he vouches for the goods which bear it; it carries his name for good or ill. If another uses it, he borrows the owner's reputation, whose quality no longer lies within his own control. This is an injury, even though the borrower does not tarnish it, or divert any sales by its use; for a reputation, like a face, is the symbol of its possessor and creator, and another can use it only as a mask. And so it has come to be recognized that, unless the borrower's use is so foreign to the owner's as to insure against any identification of the two, it is unlawful. *Aunt Jemima Mills Co. v. Rigney*, 247 F. 407, L. R. A. 1918C, 1039 (C. C. A. 2); *Akron-Overland v. Willys-Overland*, 273 F. 674 (C. C. A. 3); *Vogue Co. v. Thompson-Hudson Co.*, 300 F. 509 (C. C. A. 6); *Wall v. Rolls-Royce*, 4 F. (2d) 333 (C. C. A. 3).”

(b) **To Infringe a Trade-mark, One Does Not Have to Copy the Entire Trade-mark, if the Part Which He Does Copy Is Enough to Lead to Confusion.**

The law is well settled that one does not have to make a slavish copy of another's *entire* trade-mark in order to infringe it, if what he does copy is enough to cause confusion.

Saxlehner v. Eisner, 179 U. S. 19, 45 L. Ed. 60.

This is particularly true where the trade-mark consists of both words and a symbol having the same meaning. For instance, see the following cases:

In *Hutchinson v. Blumberg*, 51 Fed. 829, 831, the plaintiff's trade-mark consisted of the word “Star” accom-

panied by a star-shaped symbol. The defendant did not use the word “Star,” but did use a star and crescent symbol. In holding this to be infringement, the court said:

“ . . . It is very evident, I think, that any person disposed to take advantage of a customer, having the defendant’s goods in his store, could, on inquiry being made for ‘Star Goods,’ which is the common designation of complainants’ goods . . . hand to the customer defendant’s goods, and say: ‘These are the “Star Goods”’ ”

In *United Electric Co. v. Replogle*, 289 Fed. 626, a red band around the base as a trade-mark for vacuum cleaners, was held confusingly similar to a trade-mark consisting of the words “Red Ring” accompanied by a red ring-like symbol. The court observed that the red band “might be aptly described as a ‘red ring,’ and it is believed that a purchaser who had been advised to buy a ‘Red Ring’ cleaner, or had seen a reference to a ‘Red Ring’ cleaner, would ordinarily accept the product bearing the red band as answering the description of the ‘Red Ring.’ ”

In *Gordon Dry Gin Co. v. Eddy & Fisher Co.*, 246 Fed. 954, 955, the plaintiff’s trade-mark comprised the words “Boar’s head” accompanied by a picture of a boar’s head. The defendant’s mark was merely a picture of a boar’s head. In holding infringement, the court said:

“ . . . If plaintiff’s goods have, from his trade-mark become known in the market by a particular name, the adoption by the defendant of a mark or name which will cause his goods to bear the same

name in the market is as much a violation of plaintiff's rights as an actual copy of his mark."

In *Aktiengesellschaft Fur F., etc. v. Kny-Scheerer Corp.*, 80 F. 2d 266, the plaintiff's trade-mark was a picture of a serpent entwined on a staff and a crown (commonly known as the physician's symbol named "Aesculap"). The defendant did not use any symbol, but used as his trade-mark the word "Aesculap," which had the same meaning as the symbol. The defendant's mark was held to be confusingly similar to the plaintiff's mark.

In *Bradstone Rubber Co. v. Coe*, 34 Fed. Supp. 926, a trade-mark consisting of a green circular line symbol displayed on rubber heels, was held to be confusingly similar to a mark consisting of a red circular line symbol for the same goods.

In *Derby Oil Co. v. White Star Refining Co.*, 62 F. 2d 984, a trade-mark consisting of the words "White Star" was held to be confusingly similar to a trade-mark consisting of a symbol showing a picture of a white star.

In *Kushner & Gillman v. Mayflower Worsted Co.*, 11 F. 2d 462, a trade-mark consisting of the word "Mayflower" was held infringed by a trade-mark consisting of a picture of the ship "Mayflower."

The trade-mark statute, 15 U. S. C. A. 1114(1), provides:

"Any person who shall, in commerce, (a) use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of any registered mark in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely

to cause confusion or mistake or to deceive purchasers as to the source of origin of such goods or services; or (b) reproduce, counterfeit, copy, or colorably imitate any such mark and apply such reproduction, counterfeit, copy, or colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale in commerce of such goods or services, shall be liable to a civil action by the registrant for any or all of the remedies hereinafter provided”

The courts have often observed that, when an unscrupulous trader wants to deceive, he will not boldly copy his competitor's entire trade-mark. He will copy only enough of it to enable him to pass off his goods as those of his competitor, and will omit enough to provide himself with some cover if his piracy is challenged.

Saalfeld Publishing Co. v. G. & C. Merriam Co.,
238 Fed. 1.

(c) From the Standpoint of Infringement or Unfair Competition, It Is Immaterial Whether or Not Plaintiff's White Line Symbol in Itself Constitutes a Valid Technical Trade-mark.

The trial court found [Finding XIX; R. 61] that plaintiff's white circular line symbol does not, in itself, constitute a valid technical or common law trade-mark, although the court did not state in the findings upon what facts or ground it based this conclusion. It is assumed that the court based the conclusion upon the fact that color *alone* does not constitute a technical trade-mark. However, when color is embodied in a particular pat-

tern, such as a circle, square, star, or cross, as is the case here, it constitutes a trade-mark.*

The only material inquiry here is, not whether the portion of plaintiff's composite trade-mark which defendant has copied constitutes a valid technical trade-mark in itself, but whether defendant has copied enough of plaintiff's composite mark to create confusion.

In any event, insofar as the issue of unfair competition is concerned, it is not at all necessary that the white circular line symbol constitute a technical trade-mark; nor is it necessary that plaintiff establish any exclusive property right in it.

Brooks Bros. v. Brooks Clothing of Calif., 60
Fed. Supp. 442; aff'd 158 F. 2d 798 (9th Cir.);

International News Service v. Associated Press,
248 U. S. 215, 63 L. Ed. 211;

Weinstock, Lubin & Co. v. Marks, 109 Cal. 540;

American Philatelic Soc. v. Claibourne, 3 Cal. 2d
689.

"Unfair competition is distinguishable from infringement of a trade-mark in this: that it does not involve necessarily the question of the exclusive right of another to the use of the name, symbol or device. A word may be purely generic or descriptive, and so not capable of becoming an arbitrary trade-mark, and yet constitute unfair competition."

Nims "Unfair Competition and Trade Marks," p.
11, Sec. 1.

*Color may constitute a valid technical trade-mark "if it be impressed in a particular design, as a circle, square, cross or a star." (*Leschen & Sons Rope Co. v. Broderick*, 201 U. S. 166, 50 L. Ed. 710.)

- (d) Where an Infringer Has Copied His Competitor's Trade-mark and His Goods Are the Same in Appearance, the Mere Fact That the Infringer Shows His Own Name Upon the Product Is Not Sufficient to Enable Unsuspecting Customers to Distinguish His Product From That of the Trade-mark Owner.

Defendant Pachmayr appears to contend that, simply because his name appears upon his recoil pads, the public should be able readily to distinguish them despite the fact that they are identical with plaintiff's pads in appearance and also bear the white line symbol which plaintiff employs to distinguish its product. This certainly is not the law.

Enterprise Mfg. Co. v. Landers, Frary & Clark,
131 Fed. 240, 241.

Moreover, the proofs of *actual* confusion and passing off in this case completely refute such a contention.

- (e) Trade-marks Should Be Protected Not Only for the Benefit of Their Owners, but Also for Protection of the Public Against Having Spurious Products Passed Off Upon It.

The following quotation from the United States Senate report leading to enactment of the present trade-mark act is particularly apt:

"Trade-marks are the essence of competition, because they make possible a choice between competing articles by enabling the buyer to distinguish one from the other. Trade-marks encourage the maintenance of quality by securing to the producer the benefit of the good reputation which excellence creates. To protect trade-marks, therefore, is to protect the public from deceit, to foster fair competition, and to secure to the business community the advantages

of reputation and good will by preventing their diversion from those who have created them to those who have not.”

Senate Report, 1333, 79 Congress, 2d Session.

- (f) Where a Party Is Associated in Business With a Trade-mark Owner and Leaves That Association to Engage in a Competing Business, He Must Exercise Great Care to Distinguish His Product From That of the Trade-mark Owner.

As said by the Supreme Court in *International News Service v. Associated Press*, *supra*:

“ . . . The parties are competitors in this field; and, on fundamental principles, applicable here as elsewhere, when the rights or privileges of the one are liable to conflict with those of the other, each party is under a duty so to conduct its own business as not unnecessarily or unfairly to injure that of the other. *Hitchman Coal & Coke Co. v. Mitchell*, 245 U. S. 229, 254, 62 L. Ed. 260, 277, L. R. A. 1918C, 497, 38 Sup. Ct. Rep. 65, Ann. Cas. 1918B, 641.”

Here, defendant Pachmayr has the duty to be unusually cautious to distinguish his product from plaintiff's, because of his past association with the plaintiff corporation as well as its predecessor. In fact, when first incorporated in 1935, the plaintiff corporation was known as the “Frank Pachmayr Corporation,” which name was changed when defendant left the corporation. Thus, it is quite probable that many in the trade who recall his association with the plaintiff, may think he is again or still associated with plaintiff or that plaintiff is in some way sponsoring his product, if he displays plaintiff's distinguishing symbol upon his product.

POINT II.

The Former Superior Court Judgment Is Not Res Judicata as to Any Issue Here Involved.

- (a) Although Defendant Relies Upon the Defense of Res Judicata, He Has Failed to Place in Evidence Enough of the Proceedings in the Former Action to Enable the Court to Determine Precisely What Issues Were Concluded by the Former Judgment.

The former judgment relied upon by defendant as constituting *res judicata*, does not disclose what issue it concluded—it is merely a judgment of dismissal, reciting that “plaintiff take nothing by its complaint.” [R. 245.] Defendant failed to place in evidence either the complaint or the answer in said former action. Although defendant did place in evidence [Ex. P-3; R. 239] the findings of fact and conclusions of law entered in that case, those findings, for the most part, merely recite that specified paragraphs of the complaint are “true” or “false,” so that there is nothing before the court to indicate what allegations were “true” or “false.”

“If upon the face of a record anything is left to conjecture as to what was necessarily involved and decided, there is no estoppel in it when pleaded, and nothing conclusive in it when offered in evidence.”

Title Guarantee & Trust Co. v. Monson, et al.,
11 Cal. 2d 621, 632.

The findings of fact which were placed in evidence indicate that, in the former action, the defendant asserted two alternative defenses, namely: (1) that the action was barred by a contract between the parties by virtue of which the defendant agreed to cease use of plaintiff's

white line symbol in consideration of plaintiff's agreement not to sue, and that the defendant had kept the agreement by abandoning use of the white line symbol [Finding XI; R. 243]; and (2) that there was no fraud upon the part of defendant because defendant commenced use of plaintiff's white line symbol in good faith and no confusion had resulted therefrom [Finding XII; R. 243].

Consequently, to determine what issue was concluded by the judgment, we must look to the opinion of the California District Court of Appeal, to which court the case was appealed by plaintiff, reported at 88 Cal. App. 2d 901.

That opinion clearly shows that the District Court of Appeal sustained the judgment *solely* upon the fact, recited in said Finding XI, that the action was barred by the oral agreement. The opinion further specifically recites that, since the defendant had abandoned the acts complained of and had therefore kept his agreement to do so, all other findings were immaterial to the judgment. For ready reference, the opinion of the District Court of Appeal recites the following:

“This is the sole question necessary for us to determine:

“Did plaintiff waive any cause of action which it may have had against defendants for unfair competition?”

“This question must be answered in the affirmative. The trial court found as follows:

“ ‘That it is true that plaintiff and defendant verbally agreed that if defendant would cease manufacturing a recoil pad with a white line therein that plaintiff would take no further action against defen-

dant; that pursuant to said verbal agreement defendant within a reasonable time, and prior to the commencement of this action, ceased the manufacture of a recoil pad using a white line therein and that defendant has not since, nor is he now manufacturing a recoil pad with a white line.'

"The foregoing finding was sustained by the uncontradicted testimony of defendant Pachmayr . . .

"In view of the foregoing finding it is clear that plaintiff waived any cause of action which it might have had against defendants for unfair competition when plaintiff, in consideration of defendants' ceasing to sell and advertise the recoil pad, agreed to take no further action against them. Abandonment of alleged unfair competition terminates plaintiff's right to relief therefrom. *Art Metal Works v. Cunningham Products Corp.*, 242 N. Y. S. 294, 306. Since defendants have complied with their portion of the agreement, plaintiff is bound by its promise.

"If one finding, supported by substantial evidence, will sustain the trial court's judgment, as in the present case the above finding does, it will be presumed that the trial court predicated its judgment upon such finding, and questions relative to other findings become immaterial upon appeal."

Having sustained the judgment upon the sole ground of the contract, it was clearly immaterial as to whether the use of plaintiff's white line symbol which defendant had thus abandoned pursuant to the contract, did or did not constitute unfair competition. *Even if the court had found that the abandoned acts did constitute competition, it would not have had any effect upon the judgment.*

- (b) Where a Judgment of Dismissal, in a Case Involving Separate Alternative Defenses, Does Not Reveal Upon Its Face Upon Which Defense It Was Based, and Where the Opinion of the Reviewing Court Shows That It Was Affirmed Upon Only One of the Alternative Defenses, if the Judgment Is Asserted in a Later Action as Res Judicata, It Is Necessary and Proper to Construe It in the Light of the Opinion of the Reviewing Court to Determine What Issue It Concluded.

Inasmuch as the former judgment relied upon by defendant [R. 245] throws no light upon the question of what it determined and concluded, if it is to receive any consideration in the present case at all, it must be construed in the light of the opinion of the District Court of Appeal to determine what it concluded.

“Where upon an appeal the supreme court, in deciding the appeal, states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case.”

2 *Cal. Jur.*, pp. 944-945.

In *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195, the United States Supreme Court, in order to determine what was necessarily determined by a former judgment which it had reviewed and upon which it had written an opinion, said:

“Reading the record of the lower court *by the opinion and judgment of this court*, it must be considered that the matters adjudged in that case were these:” etc.

In *Koehler v. Holt Mfg. Co.*, 146 Cal. 335, the original action was in the Justice Court. Appeal was taken to the Superior Court, which affirmed the judgment. The judg-

ment was then appealed to the Supreme Court, which affirmed, accepting the Justice Court judgment as construed by the Superior Court, saying:

“ . . . and the court having jurisdiction of the action had power to construe the pleadings and determine what facts were put in issue, and its findings and adjudication therein, even if erroneous, cannot be questioned collaterally.”

In *Tomkins v. Tomkins*, 89 Cal. App. 2d 243, 249, the court said:

“Where the purpose, meaning and effect of a former decree has been adjudicated in . . . a subsequent proceeding in the same action, the second adjudication is conclusive of the purpose, meaning and effect of the first.”

It is to be noted that in *Tomkins v. Tomkins*, *supra*, there was cited *Lake v. Bonyng*, 161 Cal. 120, in which the “subsequent proceeding in the same action” was an appeal, so that, in *Tomkins v. Tomkins*, the court clearly held that an appeal was included in the term “subsequent proceeding in the same action.”

Another interesting case in point is *Landon v. Clark*, 221 Fed. 841.

In that case, plaintiff Landon sued defendant Clark to quiet title to all the land beneath a certain pond. Landon had acquired title by deed from one Durland. There had been a former suit involving the land, in which Clark had sued Durland charging that he, Clark, owned all the land under the pond and that Durland had trespassed upon 8.7 acres of the land. The court held for Durland and made findings not only that Durland owned the 8.7 acres but that he also owned all the land under

the pond. After acquiring title from Durland, Landon sued Clark to quiet title to all the land under the lake, asserting that the judgment in the former action was *res judicata*. Defendant Clark, however, contended that, notwithstanding the finding in the former action to the effect that Durland owned all the land under the pond, it was only necessary to the judgment for the court to determine title to the 8.7 acres of land, and that consequently the finding as to the remainder of the land was unnecessary to the judgment and therefore did not constitute *res judicata*. To substantiate his contention as to what was necessarily concluded by the former judgment, Clark offered the opinion of the Appellate Court in the former suit. The trial court rejected the offer and held the former judgment to be *res judicata* as to all the land. In holding that the trial court erred, the United States Court of Appeals for the Second Circuit said (p. 847):

“Certainly it cannot be claimed that any of the several findings as to the title made by the trial court in the former action, other than that relating to the title to the tract of 8.7 acres was necessary to the decision of the question involved. A judgment could have been rendered and the bill dismissed, without reference to whether or no title as to the other portions of the lake was or was not in the defendant in that action. . . . We have reached this conclusion solely upon what is in the present record as to what took place in the Supreme Court of New York in which the former action was tried.

“This court, however, can take judicial notice of the statutes of the state of New York and of its official reports, and we have examined the opinions rendered in the higher courts of the state respecting the judgment which has been pleaded in the present suit.”

(c) **A Judgment Is Conclusive Only as to Those Findings Which Are Necessary for Its Support.**

Section 1911, *California Code of Civil Procedure*, provides:

“*What deemed adjudged in a judgment.* That only is deemed to have been adjudged in a former judgment which appears upon its fact to have been so adjudged, or which was actually and necessarily included therein or necessary thereto.”

The rule is aptly stated by *American Law Restatement, Judgments*, Section 69 (comment on Sec. 1(b)), as follows:

“The rule is well established that a finding in a former case does not create an estoppel if the fact found did not necessarily determine that case. The judgment must rest upon the fact found or the fact is open to relitigation. 2 Freeman, *Judgments* (5th Ed), Sec. 689; *James v. Pettis*, 134 Minn. 438, 159 N. W. 953; *Horton v. Goodenough*, 184 Cal. 451, 194 Pac. 34; *House v. Lockwood*, 137 N. Y. 259, 33 N. E. 595; *Estate of Heydenfeldt*, 127 Cal. 456, 59 Pac. 839; *Landon v. Clark* (2d Cir.), 221 Fed. 841; *Silberstein v. Silberstein*, 218 N. Y. 525, 113 N. E. 495; *Cauhape v. Park, Davis & Co.*, 121 N. Y. 152, 24 N. E. 185; *Hymes v. Estey*, 116 N. Y. 501, 22 N. E. 1087; *Dygert v. Dygert*, 4 Ind. App. 276, 29 N. E. 490; *Paul v. Barnbrook*, 58 Ind. App. 607, 106 N. E. 425; *Fairman v. Bacon*, 8 Conn. 418; *Kennedy v. Scoville*, 14 Conn. 61; *Thompson v. N. T. Bushnell Co. (C. C.)*, 80 Fed. 332. See further cases cited to the same effect in 34 C. J. p. 927, Sec. 1332, Note 96. (Wis. 233, Pages 554 and 555).”

In the leading California case of *Chapman v. Hughes*, 134 Cal. 641, at 654-655, the court stated the rule as follows:

“When the Court had found, as it did, that the syndicate agreement was superseded by the trust deed, it mattered not at all to that action what thereafter might have become of the superseding contract. The immateriality of the issue and of the finding of the court upon it, is clearly seen when one considers that if, upon appeal, the Chapmans had convinced this court that this finding was wholly unsupported by the evidence, it would not have operated to effect a reversal. If that finding had been pressed upon the attention of this court as being erroneous, it would not have merited consideration, because the conclusive answer would have been, that, *whether erroneous or not*, the judgment was in no way dependent upon it. While a general verdict or a judgment operates as an estoppel as to such matters as were necessarily considered and determined, it is never conclusive upon immaterial or collateral issues. (*McDonald v. Bear River etc. Co.*, 15 Cal. 149; *Fulton v. Hanlow*, 20 Cal. 456; *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553; *Packet Co. v. Sickles*, 5 Wall. 592; *Herman on Estoppel and Res Judicata*, sec. 275; *Wells on Res Judicata*, sec. 295.)” (Emphasis added.)

In the Illinois case of *Lily Parsons Reighley v. Continental Illinois National Bank*, 323 Ill. App. Rep. 479, the court said:

“We follow the uniform rule . . . that our failure to pass upon the trial court’s finding as un-

necessary to our decision, does not leave that finding *res judicata* between the parties.”

In the New York case of *House of Lockwood*, 137 N. Y. 259, the court held:

“A judgment does not operate as an estoppel in a subsequent action between the parties as to immaterial or unessential facts, even though put in issue by the pleadings and directly decided. But it is final as to every fact litigated and decided therein, *having such a relation to the issue that its determination was necessary to the determination of the issue.*”

In the Kansas case of *Mitchell v. Insley*, 33 Kan. 654, 7 Pac. 201, the court said:

“It is the general duty of the court trying a case to find upon all the issuable facts; yet findings which are not necessarily included in and become a part of the judgment are not conclusive in other actions. Even where such findings are confirmed by final judgment, they are adjudications only so far as they are necessarily included in and become a part of the judgment.”

See also the following cases in point:

Schofield v. Rideout, 233 Wis. 550;

Guardianship of Leach, 30 Cal. 2d 297, 311;

Hill v. Donnelly, 56 Cal. App. 2d 386;

Phillips v. Stark, 65 Cal. App. 136;

Royal Realty Co. v. Harvey, 87 Cal. App. 344.

(d) **IN NO EVENT IS A FORMER JUDGMENT CONCLUSIVE OF SUBSEQUENT EVENTS WHICH CREATE A NEW LEGAL OR EQUITABLE SITUATION.**

The present action is for trade-mark infringement and unfair competition by defendant *commencing with his resumption, in 1948*, of use of plaintiff's white line symbol.

The former judgment was based upon a contract which has since been breached by defendant's admitted resumption of use of plaintiff's white line symbol. His subsequent breach has eliminated the contract as a bar to suit.

Also, even if it could be said that Finding XI in the former action was necessary to the judgment, still the evidence in this case not only shows materially changed facts but also shows that defendant Pachmayr obtained the former judgment by fraud. Admittedly, Pachmayr resumed use of plaintiff's white line symbol as soon as he obtained the judgment in the Superior Court, which judgment he obtained by representing to the court that he had in good faith abandoned use of the symbol. Thus there is an absence of the "good faith" which Finding XII attributed to him in the former case.

"Where, after rendition of a judgment, subsequent events occur, creating a new legal situation, or altering the legal rights or relations of the parties, the judgment may thereby be precluded from operating as an estoppel. In such a case the earlier adjudication is not permitted to bar a new action to vindicate rights subsequently acquired. Am. Juris. 943, Section 246, citing *State of Missouri re Roy McKittrick, etc. v. Missouri Public Service Corporation*, 351 Missouri 961. The rule of *res judicata* extends only to the facts and conditions as they existed at the time the judgment was rendered or, more correctly

speaking, at the time the issues in the first action were made, and to the legal rights and relations of the parties as fixed by the facts determined by that judgment. When other facts or conditions intervene before the second suit, furnishing a new basis for the claims and defenses of the respective parties, the issues are no longer the same and the former judgment cannot be pleaded in bar of the second action.”

Lord v. Garland, 27 Cal. 2d 840.

See also:

50 C. J. S. 180;

Hurd v. Albert, 214 Cal. 15;

Calif. Emp. Comm. v. Matcovich, 74 Cal. App. 2d 398.

Conclusion.

Appellant respectfully submits, therefore, that, having found in accordance with the evidence that plaintiff first adopted and used the trade-mark in issue; that plaintiff has built up and owns a substantial business and good will identified by the trade-mark; that defendant has appropriated a substantial part of plaintiff's trade-mark for identical goods sold to the same customers; and that the evidence establishes actual “passing off” of defendant's product for plaintiff's, it was error for the trial court to conclude that plaintiff was not entitled to any relief even though the court did not make findings upon other material facts established by uncontradicted evidence. Appellant further respectfully submits that, since the former Superior Court judgment was based solely upon the defense that the action was barred by an agree-

ment pursuant to which defendant had abandoned the acts charged to constitute unfair competition, it was entirely immaterial to the judgment as to whether or not the abandoned acts would have constituted unfair competition if they had not been abandoned; and that, therefore, it was error for the trial court to hold that the present issues of trade-mark infringement and unfair competition were concluded by the judgment in the former Superior Court action.

Respectfully submitted,

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No. 13334

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MERESHON COMPANY, INC.,

Appellant,

vs.

FRANK A. PACHMAYR, and FRANK A. PACHMAYR, doing business under the fictitious firm name and style of PACHMAYR GUN WORKS,

Appellees.

APPELLEE'S BRIEF.

FILED

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No. 13334
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MERSHON COMPANY, INC.,

Appellant,

vs.

FRANK A. PACHMAYR, and FRANK A. PACHMAYR, doing business under the fictitious firm name and style of PACHMAYR GUN WORKS,

Appellees.

APPELLEE'S BRIEF.

Summary of Argument.

In litigation in the California state courts commenced in 1946, appellant asserted against appellee the exclusive right to a trade-mark consisting of a white line of material in the center of a gun recoil pad, separating two darker pieces of material making up the pad. After a trial on all issues, the Superior Court made complete findings of fact on all material issues adverse to appellant and rendered judgment for appellee. Upon appeal, the judgment was affirmed, and became final. Although the California District Court of Appeal based its opinion on another point, under the California law, the general affirmance of the Superior Court judgment makes it *res judicata* as to all issues passed upon by that court, even

though the appellate court did not consider or specifically discuss them. Thus, the judgment constitutes a bar to the maintenance of the present suit, and also an estoppel against appellant as to all material facts previously found against it. Appellant has shown no new facts arising since the conclusion of the state court action which would prevent the application of the doctrine of *res judicata*, and the facts adversely found previously make it impossible for plaintiff to maintain this action, either on the theory of trade-mark infringement or unfair competition.

On the merits, appellant is in the position of claiming the exclusive right to the use of the color white in a line or stripe of material running around the center of a gun recoil pad. Color alone is not the subject of exclusive appropriation, and the line of material alone is not a definite or arbitrary symbol or design.

Furthermore, the use of the white line of material is old and common to the trade and appellant failed to prove and inherently could not prove that the white line of material signified only goods manufactured by it.

While appellee admittedly uses a white line or lamination on his gun recoil pads, he invariably marks his product plainly with his own name and from the standpoint of color, symbols, and labeling, the boxes in which his product is invariably sold have nothing in common with those of appellant. The evidence failed to show any confusion or any reasonable likelihood of confusion, and only the most careless and inattentive buyer would fail to distinguish the two products. Appellee was not required to make the market foolproof and, under the facts, a purchaser would be chargeable with knowledge that any manufacturer of gun recoil pads was entitled to use the

color white in the product. Furthermore, appellee at no time in advertising his product used the words “White Line” which, with the white line of material, make up appellant’s claimed composite trade-mark. Appellee’s advertising at all times used his own name and laid no emphasis upon the white line of material in the product.

All findings of the District Court are supported by substantial evidence and are not clearly erroneous. On any theory appellant has not made out a case in unfair competition or trade-mark infringement.

POINT I.

The Judgment in the Action in the State Court Is Res Judicata as to All Issues Raised on this Appeal.

(a) The History of the State Court Litigation.

From the standpoint of chronology and logic, it seems appropriate for appellee to discuss first the defense of *res judicata*.

Appellant asserts at the outset that it cannot be satisfactorily ascertained what was decided in the State Court action. By indirection, appellant seems to be asserting that the findings of the District Court are not supported by any evidence. This claim is based upon a false premise, since the record clearly shows that the Complaint and Answer in the California Superior Court action were offered in evidence and admitted as Appellee’s Exhibits P-1 and P-2. [R. 217; see also R. 89-91, 171-172.] Thus, we may rely upon the findings of fact of the District Court to determine the history of the Superior Court action and what was decided in that proceeding. [R. 51-56.]

In October, 1946, appellant instituted suit against appellee in the Superior Court of the State of California in and for the County of Los Angeles in action number 520672 seeking an injunction restraining appellee from manufacturing a gun recoil pad having a white line or lamination interposed between different colored lines or laminations and for an accounting of damages and profits. The suit was tried in the Superior Court, which made findings of fact as follows:

1. That during the nine years preceding the filing of the Complaint on October 21, 1946, appellant had been advertising and selling a certain rubber and composition recoil pad for attachment and use on stocks of guns, said recoil pad having at all times had a stratum or layer of white material which presented the appearance of a white line along the exterior edge completely around said recoil pad [R. 52];

2. In effect, that other persons besides appellant and appellee had previously sold a recoil pad with a white line running through or around it;

3. That the gun recoil pads sold and advertised by appellant had not become universally known as "white line" recoil pads;

4. That between September, 1945, and April 17, 1946, appellee sold and advertised recoil pads of the same general type as those sold by appellant, but appellee had not knowingly, unfairly, deceitfully or falsely adopted or used or promoted or exploited appellant's "white line" recoil pad designs for the purposes of unfairly or deceitfully obtaining the benefits of appellant's advertising and publicity or the benefit of the large and substantial investments made by appellant in the sales promotion

of said designs or for the purpose of depriving appellant of the profits thereof or appropriating said profits to appellee [R. 53];

5. That appellee did not at any time advertise or sell “white line” recoil pads under any false representations and that no act of appellee deceived or tended to deceive any actual or prospective customer of appellee;

6. That appellant had not sustained any damage by reason of the acts of appellee [R. 54];

7. That although the pads of appellant and appellee were similar in shape and dimension, the similarity was occasioned by and did not extend beyond that necessitated by the nature of the product.

That appellee at all times acted in good faith and at no time attempted to or did capitalize upon any good will or reputation of appellant or attempt to pass off or actually pass off his recoil pads as those of appellant.

That the pads of appellant had not become so generally known that any recoil pad with the white line would be thought to be a product of appellant.

That the manufacture, exploitation and sale of recoil pads by appellee, with or without the white line, did not deceive nor have any reasonable tendency to deceive the public or customers or prospective customers of appellant; that in all advertising and exploitation of his recoil pads, appellee represented and publicized that he was the manufacturer thereof and clearly negated any connection or association between his recoil pads and those of appellant; that the recoil pads manufactured by appellant contained the words “white line”; that those of appellee did not contain such words but contained the

word “Pachmayr” and on their face were readily distinguishable from the product sold by appellant. [R. 55; see also R. 240-244.]

Responsive to one of appellee’s affirmative defenses in the Superior Court action, the trial court also found that appellant and appellee had verbally agreed that if appellee would cease manufacturing a recoil pad with a white line therein, appellant would take no further action against appellee, and that pursuant to said verbal agreement appellee within a reasonable time and prior to the commencement of the Superior Court action ceased the manufacture of a recoil pad with a white line. [R. 243.]

Appellant endeavors to characterize the Superior Court judgment which followed as “a judgment of dismissal.” (App. Op. Br. pp. 5, 22.) However, the judgment itself shows that there was a contested trial in the Superior Court, that evidence both oral and documentary was introduced by both parties and that judgment was plainly a judgment on the merits. [R. 245-246.] It was clearly a determination that appellee was not guilty of unfair competition and, as will be shown, was also not guilty of trademark infringement. It was also a determination that appellant had no exclusive right to the use of the white line in the product and had no right to prevent appellee from using a similar white line in his gun recoil pad. Obviously, the judgment at this stage did more than determine that appellee had fulfilled his part of the bargain in connection with the oral agreement and the judgment can certainly not be said to rest solely upon a separate alternative defense. The findings covered all material issues raised by the Complaint and

Answer and covered by the evidence produced at the Superior Court trial, as required by California law (24 Cal. Jur. 935-936, Note 7).

Thereafter, the Superior Court denied appellant's motion for a new trial and appellant perfected an appeal to the District Court of Appeal, Second Appellate District of California. Briefs were filed and the appeal was submitted. [R. 56.]

(b) The Effect of the Decision of the California District Court of Appeal.

The opinion of the District Court of Appeal shows on its face that the Superior Court judgment was affirmed. (88 Cal. App. 2d at 905.) The remittitur from the District Court of Appeal to the Superior Court provided:

“The above-entitled cause having been heretofore fully argued and submitted and taken under advisement and *all and singular the law and premise having been fully considered, it is ordered* and adjudged and decreed by the court that *the judgment of the Superior Court* in and for the County of Los Angeles in the above-entitled cause *be* and the same is hereby *affirmed*.” [R. 173.] (Italics ours.)

Thus, we have a situation in which the judgment of the Superior Court was fully and completely affirmed on appeal, but the text of the opinion discussed only a single point. Admittedly, the opinion of the District Court of Appeal did not specifically discuss the evidence and findings concerning the issue of unfair competition. Thus, we are brought to the primary question, namely, the effect of a general affirmance of a judgment on appeal where all points decided below are not discussed specifically in

the opinion of the Appellate Court. This is plainly a question of California law. (*New-Cal Electric Securities Company v. Imperial Irrigation District*, 85 F. 2d 886, 898 (C. C. A. 9); *Larber v. Vista Irrigation District*, 127 F. 2d 628, 634, (C. C. A. 9).) The leading California case on this question is *Bank of America v. McLaughlin*, 40 Cal. App. 2d 620. The Court said at pages 628-629:

“‘*A general affirmance of a judgment on appeal makes it res judicata as to all the issues, claims, or controversies involved in the action and passed upon by the court below, although the appellate court does not consider or decide upon all of them.*’ Upon the same subject and to the same result, it was said in *State v. City of Cleveland*, 60 Ohio App. 395 (22 N. E. (2d) 223, 226):

“‘However, it is universally held that a court speaks by its record or journal and not by its opinions, and nothing contained in the opinion of the Circuit Court of Appeals can affect the adjudication of the District Court, unless carried into the judgment of the reviewing court. The judgment of the Circuit Court of Appeals was an affirmance of the judgment of the District Court leaving that judgment in its entirety as a final and binding adjudication of the issues presented. (Citing cases.)’

“From the foregoing it must follow that, when the bankruptcy court determined that the petitioner therein had no interest in the property listed, such determination became final as to that issue, *notwithstanding the fact that the Circuit Court of Appeals, in affirming the judgment, based its conclusions upon the other issue.*” (Italics ours.)

Other California decisions are not lacking. In *People v. Skidmore*, 27 Cal. 287, the Court said at pages 292-293:

“But the nature and scope of the Court’s final action is clearly indicated by the words ‘judgment affirmed,’ as they occur in the published report of the case. (17 Cal. 261.) We have examined the record, now remaining in this Court, and find an unqualified entry to the effect that the judgment was affirmed.

“The Court, in examining the judgment in connection with the errors assigned, found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors. But the affirmance, still, was an affirmance to the whole extent of the legal effect of the judgment at the time when it was entered in the Court below. The Supreme Court found no error in the record, and therefore not only allowed it to stand, but affirmed it as an entirety, and by direct expression.”

Other California decisions hold that the doctrine of *res judicata* applies to all issues decided by lower tribunals even though the action of the appellate court does not involve a review on the merits (*Borges v. Hillman*, 29 Cal. App. 144, 149) or the filing of any written opinion (*So. Calif. Edison Company v. Railroad Commission*, 6 Cal. 2d 737, 747; *Geibel v. State Bar*, 14 Cal. 2d 144, 148).

Appellant endeavors to assert that the District Court of Appeal specifically held that the findings of the Superior Court relative to unfair competition were im-

material. This assertion is false and unjustified by any thing appearing in the decision. The Court's statement was that "*questions* relative to other findings become immaterial *upon appeal*" (italics ours). This is no different from the statement in *People v. Skidmore, supra*:

"The Court found that there was at least one ground upon which the judgment could be justified, and therefore very properly refrained from considering it in connection with the other errors."

According to appellant's theory, issues decided by a trial court would not become *res judicata* unless each and all of the points was specifically discussed in the opinion of the Appellate Court. This is certainly not the California rule. Since the question is one of California law, the text writer statements and citations from other jurisdictions in appellee's brief (pp. 23-27) need not be specifically considered. None of the California cases cited by appellant is applicable to the facts of this case. For instance, in *Lake v. Bonyng*, 161 Cal. 120, the "subsequent proceeding in the same action" was not the appeal but rather a proceeding in the Superior Court. In that case, after final judgment, the Superior Court had acted upon a motion and the Supreme Court had affirmed an appeal. The question was whether or not the doctrine of *res judicata* had any application where the decision was on an appeal from the granting of the motion. (See 161 Cal. at pp. 129-131.)

The limited scope of the last sentence in the opinion of the District Court of Appeal is seen from an examination of *Rosenfield v. Vosper*, 86 Cal. App. 2d 687. The appellant there urged among other things that the trial

court had failed to make findings on material issues. In response thereto, the Court said at page 692:

“In a case where one correct finding supported by substantial evidence will support a judgment, it will be presumed that the trial court predicated its judgment upon such finding, and it is not necessary to make findings upon other issues raised by the pleadings. (See *American National Bank v. Donnellan*, 170 Cal. 9, 15 (148 P. 188, Ann. Cas. 1017C 744); *Hill v. Donnelly*, 56 Cal. App. 2d 387, 392 (132 P. 2d 867).)”

It is one thing to say that a trial court need not make findings on all issues raised by the pleadings in a case where a finding on one point will support the judgment, or that where a trial court judgment may be sustained on a finding responsive to one point in the case, other findings become immaterial upon appeal. It is quite another thing to claim falsely, as does appellant, that the opinion of the District Court of Appeal in *Mershon Co. v. Pachmayr* amounted to a determination that all findings of the Superior Court except finding XI were immaterial.

It seems appropriate to close this branch of the argument with a reference to the former position of appellant before the California Courts. After the District Court of Appeal had affirmed the judgment of the Superior Court, appellant unsuccessfully petitioned for a rehearing. It then filed a petition for hearing by the Supreme Court of California, which petition was denied [R. 57]. Appellant, appearing by one of the same counsel who presently represent it, made the following argument in its petition for hearing by the Supreme Court of California:

“(b) The opinion of the District Court on page 926 (88 A. C. A. (4.) also holds as follows:

“ ‘If one finding, supported by substantial evidence, will sustain the Trial Court, it will be presumed that the Trial Court predicated its judgment upon such finding, and questions relative to other findings become immaterial upon appeal. (*Rosenfield v. Vosper*, 86 Cal. App. 2d’) (Reprinted in 86 A. C. A. 717, 722.)

“We submit that the facts of this quoted case ideally illustrate how unfair such a holding, if allowed to stand, would be to Appellant.

“The Trial Court found that the conduct of Respondent in manufacturing and selling ‘White Line’ Recoil Pads, did not constitute unfair competition against Appellant. The Appellant appealed from the judgment—specifically attacking the said Finding and Conclusion of the Trial Court. The District Court refused to review the question of unlawful competition by shortcircuiting the Opinion with the theory of waiver and abandonment.

“Yet should respondent renew the manufacture and sale of the ‘White Line’ recoil pads, such renewal would be in fact and law unlawful competition—(the Trial Court being in error on this issue)—nevertheless appellant would be without a remedy—because he would be estopped under the rule of *res adjudicata*.

“ ‘A general affirmance of a judgment on appeal makes it *res adjudicata* as to all issues, claims and controversies involved in the action and passed upon by the court below, although the Appellate Court does not consider or decide upon all of them.’ ”

Bank of America v. McLaughlin, etc., supra.

“The case of *Rosenfield v. Vosper* cited in the opinion of the District Court holds that where a Trial Court (as distinguished from an Appellate Court) makes one correct finding that will support the judg-

ment, but fails to make findings on other issues, it will be presumed upon appeal that the Trial Court predicated its judgment upon such finding, and it is not necessary to make findings upon the other issues. (See 86 A. C. A. 717 at 722(2).) The cases cited therein are factually similar.”

“But in the case at bar, the Trial Court, among others, made findings upon the primary issue; *i. e.*, the issue of unlawful competition (which was not reviewed by the District Court) and we submit that appellant is entitled to have this issue with the others reviewed upon appeal, as it presents a question of both law and fact. If the Trial Court was in error, then Appellant should not be foreclosed by the principle of *res adjudicata*—and respondent should be enjoined from further unfair competition even though damages might be denied. (Citing cases.)

“In short, the holding by the District Court that one material finding is sufficient and there is no need to bother about the others, may be a good rule when applied to a case in which the trial court made but one finding—on a material issue which supports the judgment, but not where the trial court makes findings on all issues, one of which might either reverse the judgment, or by the principle of *res adjudicata* be prejudicial to Appellant if found to be erroneous.” (Appellant’s Petition for Hearing pp. 12-14.)

It is recognized that the exigencies of the situation will sometimes require counsel to take inconsistent positions. It may be that appellant thought at the time the petition for hearing was filed before the California Supreme Court that the decision by the District Court of Appeal made the issue of unfair competition *res judicata* and now thinks that this was erroneous. It may be ap-

pellant then thought that finding XI of Superior Court was wholly immaterial and now urges in all sincerity that finding XI was the only material finding made by the Superior Court. Nonetheless, at the very least, this argument makes it crystal clear that the issue of unlawful competition was fully tried in the State Court action and that on appeal, appellant here regarded it as the “primary issue.” The former attitude and argument of appellant is at least material in connection with the present argument made in its brief before this Court.

(c) The State Court Had Jurisdiction to Adjudicate and Did Adjudicate the Question of Trademark Infringement at Common Law.

The early case of *Derringer v. Plate*, 29 Cal. 292, announced the law of California respecting trade-marks. The court there decided the following points:

(1) That at common law a trade-mark right of property existed by virtue of adoption and use;

(2) That the right to a trade-mark can and does exist without the aid of statute;

(3) That the California Act of 1863 concerning trade-marks was in a large part declaratory of the common law and that the remedies of common law, including an action for damages and for an injunction were unaffected by the Statute of 1863, and

(4) That notwithstanding the Act of 1863 providing for the registration of a trade-mark with the Secretary of State, the owner of an unregistered trade-mark still possessed his common law rights arising out of adoption and use. (See also on this point, although involving later statutes: *Chandler Building Co. v. Caldwell*, 8 Cal. App. 2d 375; *Cole*

of California v. Grayson Shops, 72 Cal. App. 2d 772, 777; *Wetherford v. Eytchison*, 90 Cal. App. 2d 379, 382.)

At the time of the commencement of the action in the Superior Court, California had elaborate statutes on the subject of trade-marks (Business and Professions Code, Sections 14,200-14,325.) The California courts clearly had jurisdiction to determine rights to a trade-mark, and to give damages and an injunction, if appellant had prevailed in the Superior Court (Business and Professions Code, Sections 14,300.) The substance of appellant's pleading in the Superior Court has already been covered and the findings made in the Superior Court were obviously responsive to appellant's complaint and the denials of the answer. It is submitted that this pleading was sufficient to constitute a cause of action for trade-mark infringement at common law. In essence, appellant sought unsuccessfully in the State Court to establish an exclusive right to the use of the white line of material in a gun recoil pad.

The situation is identical to that in *Armstrong Paint & Varnish Co. v. Nu-Enamel Corp.*, 305 U. S. 315, 83 L. Ed. 195, 59 Sup. Ct. 191. There the plaintiff sought by a count in unfair competition and a count in trade-mark infringement to establish its exclusive right to the use of a trade-mark. As in this case, the cause of action in unfair competition, standing alone, could not have been brought in the Federal District Court because of lack of diversity of citizenship. Hence, the count for trade-mark infringement was essential to give jurisdiction. The Supreme Court said:

“In this case the trial court concluded that the invalidity of the trade-mark divested it of jurisdic-

tion over unfair competition. This was erroneous. Once properly obtained, jurisdiction of the one cause of action, the alleged infringement of the trade-mark, persists to deal with all grounds supporting it, including unfair competition with the marked article. The cause of action is the interference with the exclusive right to use the mark 'Nu-Enamel.' If it is a properly registered trade-mark, a ground to support the cause of action is violation of the Trade-Mark Act. If it is not a properly registered trade-mark, the ground is unfair competition at common law. *The facts supporting a suit for infringement and one for unfair competition are substantially the same. They constitute and make plain the wrong complained of, the violation of the right to exclusive use.*

"In the *Oursler* case there was a valid copyright which was held not infringed. Here the trial court determined the trade-mark was invalid. The *Oursler* case held that where the causes of action are different, the determination that the federal cause fails calls for dismissal. *But where there is only one cause of action* we do not consider that the holding of the invalidity furnishes any basis for a distinction between this and the *Oursler* case." (305 U. S. 324-325.) (Italics ours.)

See also:

Sunbeam Furniture Corp. v. Sunbeam Corp., 119 F. 2d 141, 145 (C. C. A. 9).

In *Campbell Soup Company v. Armour & Co.*, 175 F. 2d 795 (C. C. A. 3), the court said at pages 796-797:

"A case which involves trade-mark infringement only, without reference to the federal statute, is governed by state law. *Anheuser-Busch, Inc. v.*

DuBois Brewing Co., 3 Cir. 1949, 175 F. 2d 370. This is perfectly logical, for trade-mark infringement is but one phase of the general subject of unfair competition. As to this subject, too, state law governs. *Pecheur Lozenge Co. Inc. v. National Candy Co., Inc.*, 1942, 315 U. S. 666, 62 S. Ct 853, 86 LED 1103”

* * * * *

“The trade-mark registration statute expressly confers jurisdiction on federal courts for litigation arising under it. But, on the other hand, federal registration does not create a trade-mark. The trade-mark comes from use, not registration, and the right to it is in the nature of a property right based on common law.”

In *Smith v. Dental Products Co.*, 140 F. 2d 140 (C. C. A. 7), the court said at page 149:

“What we have said and held concerning the charge of trade-mark infringement is largely and perhaps entirely decisive of that of unfair competition. Defendant makes the following statement in its brief, undoubtedly the law: ‘The essence of trade-mark infringement, as is the essence of unfair competition, is passing off one’s goods as those of another (*Hanover Starr Mill Co. v. Metcalf*, 240 U. S. 403, 413, 36 S. Ct. 357, 6 LED 713, 718). *There can be unfair competition without the existence of trade-mark infringement, but there cannot be any trade-mark infringement, without the presence also of those acts which amount to unfair competition.*” (Italics ours.)

See also:

Academy Award Products, Inc. v. Bulova Watch Co., 90 Fed. Supp. 12 (D. C. S. D. N. Y.).

- (d) Even If It Is Assumed That the Trademark Infringement Cause of Action Is a Different Cause of Action From That Asserted in the Superior Court, the Former Judgment Operates as an Estoppel as to All Facts and Issues Which Were Actually Litigated and Determined in the Previous Action.

In *Nev-Cal Electric Securities Company v. Imperial Irrigation District*, 85 F. 2d 886, this court reviewed decisions of the Supreme Court of California in order to determine the effect of a judgment as *res judicata*. It said at page 898:

“In *Todhunter v. Smith*, 219 Cal. 690, 694, 28 P. (2d) 916, 918, which is cited by the appellees themselves, the court used the following language: ‘The doctrine of *res judicata* has a double aspect. A former judgment operates as a bar against a second action upon the same cause, but, in a later action upon a *different* claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action *as were actually litigated and determined in the first action*. (Italics our own.)’ In *re Estate of Bell*, 153 Cal. 331, 340, 95 P. 372; *Horton v. Goodenough*, 184 Cal. 451, 461, 194 P. 34; *Pomona College v. Dunn*, 7 Cal. App. (2d) 227, 46 P. (2d) 270, 273, hearing denied by the Supreme Court of California, July 24, 1935; 15 Cal. Jur. Sec. 189, pp. 136, 137; 7 Cal. Jur. Supp. Sec. 189, p. 326.

“The California rule accords with the view held by the United States Supreme Court.”

The most recent decision of the United States Supreme Court, is *United States v. Munsingwear, Inc.*, 340 U. S.

36, 71 S. Ct. 104, 95 L. Ed. (Adv. Op.) 70. The Supreme Court said (pp. 70-71):

“The controversy in each of the suits concerned the proper pricing formula applicable to respondent’s commodities under the maximum price regulation. That question was in issue and determined in the injunction suit. The parties were the same both in that suit and in the suits for treble damages. There is no question but that the District Court in the injunction suit had jurisdiction both over the parties and the subject matter. And its judgment remains unmodified. We start then with a case which falls squarely within the classic statement of the rule of *res judicata* in *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48, 49, 42 L. ed. 355, 376, 377, 18 S. Ct. 18: ‘The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.’ And see *Cromwell v. County of Sac*, 94 U. S. 351, 352, 24 L. ed. 195, 197; *Commissioner v. Sunnen*, 333 U. S. 591, 597, 598, 92 L. ed. 898, 905, 906, 68 S. Ct. 715.”

If, as held in *Smith v. Dental Products Company*, *supra*, and other cases, there cannot be any trade-mark infringement without the presence also of those acts which amount to unfair competition, the determination in the State Court proceeding that all elements necessary to en-

able appellant to establish unfair competition were lacking, is fatal to the establishment of the trade-mark infringement cause of action in this case.

(e) No New Facts Have Been Shown Which Would Prevent the Superior Court Judgment From Being Res Judicata.

Appellant, without referring to the evidence, claims that the facts have materially changed since 1946 and therefore, the former judgment is not conclusive. (App. Br. p. 28.) It is submitted that there is no evidence to which appellant could point showing materially changed facts. Certainly, the registration of appellant's trade-mark added nothing to its substantive rights. At the most, federal registration of the claimed trade-mark created a presumption of ownership and conferred jurisdiction on the federal court. (*Campbell Soup Co. v. Armour & Co.*, *supra*; *Western Stove Company v. Geo. P. Roper Corp.*, 82 Fed. Supp. 206, 271 (D. C. S. D. Cal.); *Academy Award Products v. Bulova Watch Co.*, 90 Fed. Supp. 12 (D. C. S. D. N. Y.).)

Appellant's gun recoil pad before and after 1948 is the same as far as the use of the white line is concerned. [R. 120-121.] There is, likewise, no essential change in the appearance of appellee's pad. [R. 158.] The type and kind of advertising done by appellant is unchanged. [R. 127-128.] There is evidence that the amount of money spent by appellant on advertising has increased since 1946 [R. 128], but this is without legal significance. (*Kellogg Co. v. National Biscuit Company*, 305 U. S. 111, 119, 83 L.Ed. 73, 59 S. Ct. 109.)

Whether or not the Reporter's Transcript in the Superior Court is considered by this Court [R. 217], it may properly be inferred from the findings in the State action

that plaintiff offered evidence to show confusion. Yet, the Superior Court found as a fact that the manufacture, exploitation and sale of recoil pads by defendant, with or without said white line did not, in effect, deceive, nor did it have any reasonable tendency to deceive the public or customers or prospective customers of plaintiff.” [R. 244.] The alleged evidence of confusion in this case (apart from its inherent weakness) is also insufficient in the light of the fact that neither appellant nor appellee has made any change in the use of the white line. It would be absurd to contend that members of the public are now likely to be confused, if they were not confused by the same pads prior to 1946. The dictum of the California Supreme Court in *Lord v. Garland*, 27 Cal. 2d 840 (see pp. 849-850), therefore has no application to the facts of this case. On the record here, *Denio v. City of Huntington Beach*, 74 Cal. App. 2d 424, 430-432, is decisive:

“Nor do we think the cause of action herein is so essentially different, in a sense material here, from that set forth in the former action as to avoid the effect of the usual rule against the splitting of defenses. As was said in *Panos v. Great Western Packing Co.*, 21 Cal. 2d 636 (134 P. 2d 242): ‘The cause of action is simply the obligation sought to be enforced.’ In a very real sense this action involves the same obligation which was litigated in the former action. The obligation sought to be enforced in this action, as well as in the former action, is that of the contract for compensation for legal services. If that contract is valid and enforceable to the extent of requiring the payment of a percentage of moneys received from a certain source for a certain period, it would be entirely inconsistent to

hold that a judgment upholding that contract for a part of the period provided for had no binding effect on the claim for compensation for the remainder of the period covered by the contract. The validity and binding effect of the contract for services was the basic issue in the former action and is the basic issue in the present issue. In *Sutphin v. Speik*, 15 Cal. 2d 195 (99 P. 2d 652, 101 P. 2d 497), the validity of an assignment was the basic issue in a former action. It was also the basic issue in the case cited although somewhat different facts were involved. In holding that the judgment in the first action was *res judicata* the court said: 'After that judgment became final, plaintiff's right to a portion of the production from those wells was conclusive as between the parties, even in the present suit on a different cause of action, because the basic issue thus decided in the first case is identical with that in the present case.' In *DeHart v. Allen*, 26 Cal. 2d 829 (161 P. 2d 453), a judgment in a former action was held *res judicata* since issues as to the validity and binding effect of a certain lease either were raised or could have been raised in the prior action.

"Moreover, facts were settled in the former action, which was between the same parties, which are controlling here, namely the execution, validity and binding effect of the contract for services between these parties. The validity and binding effect of that contract was actually litigated and determined in the former action. As was said in *Estate of Clark*, 190 Cal. 354 (212 P. 622), a 'judgment is binding not only in proceedings upon the same but also upon a different cause of action in so far as it settles and determines questions of

fact. (23 Cyc., 1288-1290.) It is well settled that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of that fact is again in issue between them, not only when the subject-matter is the same, but when the point comes *incidentally* in question in relation to a *different* matter in the same or any other court. (*Freeman on Judgments*, secs. 249 and 253; *Lamb v. Wahlenmaier*, 144 Cal. 91 (103 Am. St. Rep. 66, 77 P. 765); *Reed v. Cross*, 116 Cal. 473, 484 (48 P. 491); *Atchison T. & S. F. Ry. v. Nelson*, 220 F. 53 (135 C. C. A. 621).) That is to say, “a matter of fact once adjudicated by a court of competent jurisdiction, concurrent or exclusive, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it, and this too whether the subsequent suit is upon the same or a different cause of action. The facts decided in the first suit cannot be disputed.” (*Bigelow on Estoppel*, pp. 110, 111, 112; *Rauer v. Rynd*, 27 Cal. App. 556 (150 P. 780).)’

* * * * *

“The basic facts and the existence of the obligation here sued upon have been judicially determined and the final judgment in the former action is controlling here. A contrary decision here would have destroyed the rights of the respondents in a contract, the validity and binding effect of which was upheld in the former action.”

So here, the basic facts were determined in the State litigation and it was established that as against appellant,

appellee had a right to use the white line of material in the gun recoil pad. The existence of that right having been established by a judgment which has long since become final, a failure to uphold the doctrine would destroy the rights acquired and established by appellee in the previous action.

Appellant asserts in passing that appellee obtained the Superior Court judgment by fraud, that is, by falsely representing to the Court that he had in good faith abandoned the use of the white line. (App. Br. p. 28.) This claim has no support in the evidence. It was appellant's position in the Superior Court action that appellee had breached this oral agreement. On this basis, appellant filed its action in unfair competition and trade-mark infringement. The evidence showed that appellee, pursuant to his agreement, had up to the time of the Superior Court judgment, abandoned the use of the white line. But, having been forced by appellant's action to litigate the question of his right to use the white line and having obtained a favorable judgment on all issues raised by the pleadings and it having been established that it was appellant who had breached the agreement, why should appellee not have resumed the use of the white line? After a general affirmance of the Superior Court's judgment by the District Court of Appeal, there was certainly no reason not to continue the use of the white line, or not to rely upon the favorable judgment. If anyone is estopped by virtue of inconsistent action, it is appellant and not appellee.

POINT II.

On Any Theory, the Evidence Is Insufficient to Establish Either Trademark Infringement or Unfair Competition.

(a) The Position of Appellant.

At the outset it may be useful to review what it is that appellant claims. On either the theory of technical trade-mark infringement or unfair competition appellant does not claim the exclusive or any right in the form, shape or design of a gun recoil pad. [R. 4-5, 8-9, 114.] The trade-mark claimed and registered by appellant is a combination of the words "White Line" and the white line or lamination of material between contrasting colors. [R. 5, 233.] Appellant does not claim that appellee has interfered with its alleged exclusive right to the words "White Line." [R. 102; App. Br. p. 2.] Indeed, it is undisputed that appellee has never used the words "White Line" in its advertising [R. 179-180] and has invariably marked his gun recoil pads with the words "Pachmayr" or "Pachmayr Gun Works." [R. 151, 168; Exs. 8, 9, 10.] This appeal, therefore, does not involve the validity of the composite trade-mark, consisting of the words "White Line" and a white line or lamination of material in the product. Inevitably, the claim of appellant is that it has the exclusive right to the use of a white line or lamination of material in the pads, and that appellee has interfered with this asserted monopoly simply by using the color white between two darker layers of material.

The case is identical to the situation in *Campbell's Soup Company v. Armour and Company*, 175 F. 2d 795. The Court said at pages 797-799:

“It is worth the space involved to call attention to just what it is the plaintiffs claim. Their suit here is based solely upon their claimed exclusive right to the use of red and white in packaging their food products. While their registration describes the red over white as a rectangular design, when the colors appear on their packages they appear in the form of an endless band which runs around the entire container. The Campbell red is not the same on all of its products, according to the sample labels offered in the plaintiffs' exhibits. The red used by Armour is a specially blended color. The usual Armour label is white over red instead of red over white, as the plaintiffs use the colors, but in some cases Armour used the red and white bands vertically.

“What the plaintiffs are really asking for, then, is a right to the exclusive use of labels which are half red and half white for food products. If they may thus monopolize red in all of its shades the next manufacturer may monopolize orange in all its shades and the next yellow in the same way. Obviously, the list of colors will soon run out.

“That a man cannot acquire a trade-mark by color alone has been stated a good many times in decisions and textbooks.

“The rule is well stated in *James Heddon's Sons v. Millsite Steel & Wire Works*, 6 Cir., 1942, 128 F. 2d 6, 9:

“‘Color, except in connection with some definite, arbitrary symbol or in association with some charac-

teristics which serve to distinguish the article as made or sold by a particular person is not subject to trade-mark monopoly.’

“In *Diamond Match Co. v. Saginaw Match Co.*, 6 Cir., 1906, 142 P. 727, 729, the following language appears which is particularly appropriate here:

“‘Sometimes a color, taken in connection with other characteristics, may serve to distinguish one’s goods, and thus be protected by the court * * *; but, as a rule, a color cannot be monopolized to distinguish a product * * *

“‘The primary colors, even adding black and white, are but few. If two of these colors can be appropriated for one brand of tipped matches, it will not take long to appropriate the rest.’

“And in an earlier suit by Carnation’s predecessor, the Washington Supreme Court said, *Pacific Coast Condensed Milk Co. v. Frye & Co.*, 1915, 85 Wash. 133, 147 P. 865, 869:

“‘The primary colors are few, and as the evidence shows those suitable for light products, such as milk, are even more limited. To allow them to be appropriated as distinguishing marks would foster monopoly by foreclosing the use by others of any tasty dress.’ ‘Color is a perfectly satisfactory element of a trade-mark if it is used in combination with a design in the form, for example, of a picture or a geometrical figure.’

“When we say that plaintiffs cannot have exclusive right to a trade-mark of a red and white label, we are by no means denying their right to acquire a trade-mark when the color is combined with other things in a distinctive design. As a matter of fact, the distinctiveness of plaintiffs’ packages

does not depend upon color alone, although each has been granted registration of a trade-mark described in terms of color. Each has its name in one of the color bands in a uniform and specified type of script. Each has a very distinctive design on its label. Carnation has a small bouquet of carnation flowers. Campbell has a medallion of individual design. Armour, too, does not depend upon color alone. It uses different colors with different products and each has the Armour name in an individual type of script accompanied by the star which it says has been the mark of its goods over many years. In denying the plaintiffs the exclusive use of color alone we are not passing upon the question whether they have acquired trade-marks entitled to protection in the sum total of the combinations which make up their respective labels for their goods. . . .

“Finally, there was no unfair competition. Certainly there was not the slightest evidence that Armour passed off its goods as those of the plaintiffs.”

At the beginning of its argument, appellant has laid much emphasis upon the similarity in appearance between the gun recoil pads of appellant and appellee. This similarity, however, is no more significant than the inevitable similarity between other types of sporting equipment, such as guns, fishing rods or baseballs. The similarity in general appearance is due to the purpose, function and character of the gun recoil pad rather than to the factor of color. Since the appellant does not and can not claim any exclusive right to the form and design of a gun recoil pad, the similarity in appearance is of no legal significance. As the Supreme Court said in *Kellogg*

Co. v. National Biscuit Company, 305 U. S. 111, 120, 83 L. Ed. 73, 59 S. Ct. 109:

“Where an article may be manufactured by all, a particular manufacturer can no more assert exclusive rights in a form in which the public has become accustomed to see the article and which, in the minds of the public, is primarily associated with the article rather than a particular producer, than it can in the case of a name with similar connections in the public mind. Kellogg Company was free to use the pillow-shaped form, subject only to the obligation to identify its product lest it be mistaken for that of the plaintiff.”

A California case is also particularly apposite on this question. In *So. Calif. Fish Co. v. White Star Canning Co.*, 45 Cal. App. 426, 430, the Court said:

“That plaintiff’s and defendant’s cans, with their respective labels or wrappers, bear considerable resemblance to each other, may be admitted. But all of the resemblances arise from features that are common to the trade, or from the use of a design—the figure of a fish—to which no one has an exclusive right.

“That anyone is deceived by the size, shape, and general make-up of the cans, or by the prevailing color scheme of the wrappers or labels, does not help plaintiff’s case. All these features are old, separately and in combination. . . . As was said in *Coats v. Merrick Thread Co.*, 149 U. S. 562 (37 L. Ed. 847, 13 Sup. Ct. Rep. 966), the purchaser of thread ‘is chargeable with knowledge of the fact that any manufacturer of six-cord thread has a right to use a black and gold label, and is bound to examine such label with sufficient care to ascertain the name

of the manufacturer.' . . . 'The evidence is very strong that one tin may be mistaken for the other, very likely; but why? Because of the features common to them and common to all.' (Payton v. Snelling, 17 R. P. C. 628.)"

Appellant asserts that the record shows that when purchasers are seeking plaintiff's recoil pads, they ask for "White Line" pads. What the record really shows is that the purchasers lay emphasis upon the words "White Line" and not upon the white line of material in the product. Appellant's advertising has featured throughout, the words "White Line" and the name "Mershon Company, Inc." [R. 122-124.] Numerous advertisements have contained the words "Look for the name 'White Line.'" [Italics ours; R. 123-124.] L. E. Mershon, the principal witness for appellant, admitted that appellant's product is identified, primarily, by the words "White Line." [R. 93.] All pads sold by appellant have the words "White Line" on top of the pad and also the words "Mershon Company, Inc., Glendale, California," across one end of the top of the pad. [R. 121-122.] Appellee's pad has always had the name "Pachmayr" or "Pachmayr Gun Works" on it. [R. 151, 168, and see Exs. 8, 9 and 19.]

Life Savers Corporation v. Curtiss Candy Co., 182 F. 2d 4 (C. C. A. 7), was an action for trade-mark infringement and unfair competition. Both plaintiff and defendant produced and marketed packages of assorted fruit-flavored candy discs. The background of plaintiff's wrapper for its packages was nine parallel red, yellow, green, orange and purple stripes, across which the words "Life Savers," appear three times entirely across the

wrapper, together with the words "Five Flavor." The background of defendant's wrapper was eleven red, yellow, green and orange stripes. Defendant's packages of various flavors contained the printed word "Curtiss" in white letters on a square of blue, occupying half the face of the wrapper. Plaintiff claimed that as it was first in the field, the colored striped background of the label on defendant's wrapper constituted trade-mark infringement and unfair competition. The Court said at pages 7-9:

"The function of a trade-mark is to indicate the origin of the article to which such mark is applied. It may consist of any symbol, emblem, device or words, but its office is to point out distinctly the origin of the article to which it is applied. The dominant feature of plaintiff's trade-mark is the words, 'Life Savers,' appearing three times in bold white letters extending practically the length of its label. It would indeed seem unlikely for any purchaser buying a package of 'Life Savers' to avoid knowledge of the origin of the package of Life Savers. The same is likewise true as to any of defendant's packages of hard candy discs.

"A new competitor is not held to the obligations of an insurer against all possible confusion. He is not obligated to protect the negligent and inattentive purchaser from confusion resulting from indifference. *Skinner Mfg. Co. v. General Foods Sales Co., Inc.* D. C., 52 F. Supp. 432, 433, 450. It has been said that he is not required to make the market 'foolproof.' *Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 119, 59 S. Ct. 109, 83 L. Ed. 73; *Quaker Oats Co. v. General Mills, Inc.*, 7 Cir., 134 F. 2d 429, 432; *John Morrell and Co. v. Doyle*, 7 Cir., 97 F. 2d 232, 237, certiorari denied 305

U. S. 643, 59 S. Ct. 146, 83 L. Ed. 415. In *Fruit Growers Co-op. v. M. W. Miller & Co. et al.*, 7 Cir., 170 F. 2d 834, at page 837, this court said, ‘* * * Instead, they are required only to mark or designate them in such manner that purchasers exercising ordinary care to discover whose products they are buying will know the truth and not become confused or mistaken, * * *’

“This opinion quotes from *Allen B. Wrisley Co. v. Iowa Soap Co. et al.*, 8 Cir., 122 F. 796, 798: ‘* * * The duty is imposed upon every manufacturer or vendor to so distinguish the article he makes or the goods he sells from those of his rival that neither its name nor its dress will probably deceive the public or mislead the common buyer. He is not, however, required to insure to the negligent or the indifferent a knowledge of the manufacturer or the ownership of the articles he presents. * * * One who so names and dresses his product that a purchaser who exercises ordinary care to ascertain the sources of its manufacture can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it has fairly discharged his duty to the public and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition. (Citing.)’

“The validity of plaintiff’s trade-mark in its entirety is not seriously questioned. But it does not follow that plaintiff may dissect its mark and claim a monopoly on a multi-colored striped background where such background is in fact descriptive of the contents of the package on which such a label is used.

“In the *Heddon* case, *supra*, the court said, 128 F. 2d at Page 8: ‘Appellant’s mark was arranged in composite form and as such constituted a symbol.

Under such circumstances, it must be considered in its entirety, not separating the respective words from each other. * * *

“And in *Beckwith’s Estate, Inc. v. Commissioner of Patents*, 252 U. S. 538, at pages 545, 546, 40 S. Ct. 414, at page 417, 64 L. Ed. 705, the Supreme Court said: ‘The commercial impression of a trade-mark is derived from it as a whole, not from its elements separated and considered in detail. * * *’

“Defendant’s label has no common text with the plaintiff’s mark, and it is not a colorable imitation of the plaintiff’s trade-mark taken as an entirety. Only a most careless purchaser of defendant’s product could possibly be confused or mistaken that its source of origin was the plaintiff.”

Appellant next lays emphasis upon the fact that immediately before the trial his employee, Gnagi, by dint of some effort, succeeded in getting two dealers in gun recoil pads to sell him, as “White Line” pads, pads which actually were manufactured by appellee. [App. Br. pp. 10, 11; R. 138-140, 237.] In this connection it should be remembered that appellee had no personal connection with any representation made by the salesmen and did not authorize the salesmen to sell or purport to sell any Pachmayr pads as “White Line” pads. [R. 225.] The effect of this evidence is not to be determined by the statement of Mr. Nims or any other text writer but rather by the California law, since unfair competition charges are governed by local law. (*Sunbeam Furniture Corp. v. Sunbeam Corp.*, 119 F. 2d 141, 145 (C. C. A. 9).)

In *Southern Calif. Fish Co. v. White Star Canning Co.*, the Court said at pages 434, 435:

“The fact that the grocer did not deliver the brand of tuna ordered is not a determinative factor. There is no evidence to show that the grocer himself was deceived by any similarity in the labels. It is quite possible that he intentionally sought to palm off on his customers an article different from that ordered, trusting to their carelessness to obviate any detection of the intended deception. For, unfortunately, the habit that some dishonest dealers have of handing out anything they think they can sell to their customers, when they cannot supply the particular article called for, is all too common. ‘The law of unfair competition does not protect purchasers against falsehoods which the tradesmen may tell; the falsehood must be told by the article itself in order to make the rule of unfair competition applicable.’ (*Hill Bread Co. v. Goodrich Baking Co.* (N. J. Ch.), 89 Atl. 863.)”

See also:

American Automobile Assn. v. American Automobile Owners' Assn., 216 Cal. 125, 137.

It seems appropriate to devote some further attention to the evidence of confusion produced by appellant at the trial. The principal testimony on the subject of confusion came from appellant's witness, Peter M. Gnagi, a department manager employed by appellant, who, a few days before the commencement of the trial, was sent out by appellant for the express purpose of obtaining evidence of confusion. [R. 137-138, 146.] Clearly he invited, and in some instances urged, salesmen for sporting goods in Los Angeles County to put the words “White Line” on

the sales slip in instances where the pad he purchased had been actually manufactured by Pachmayr. [R. 141, 146-147.] Out of 23 to 25 calls in southern California [R. 138; Deft. Ex. "G"] the witness succeeded in only two cases in getting the salesman to sell that store's "private brand" gun recoil pad as a "White Line" recoil pad. In nine instances where the dealer handled both the "White Line" and the "Pachmayr" pads, or the "Pachmayr" pads only, the dealers' salesmen either showed the Mershon pad only as a "White Line" pad, or refused to show the "Pachmayr" pad as a "White Line" pad. The numerous statements in the witness's notes "would not represent Pachmayr as 'White Line'" indicate plainly that the witness was trying to induce the salesman to represent the Pachmayr pad as a "White Line" pad. [Ex. G.]

It is submitted that the District Court was entitled to treat Gnagi's evidence as insufficient to show confusion. In fact, this evidence, taken as a whole, can properly be regarded as not inconsistent with other evidence showing lack of confusion. Furthermore, the evidence should be largely, if not entirely, discounted under the rules of evidence and as a matter of law.

In *Steem-Electric Corp. v. Herzfeld-Phillipson Co.*, 118 F. 2d 122 (C. C. A. 7) the Court said at pages 124 and 125:

"Also, the testimony came largely, if not entirely, from paid investigators employed by the plaintiff to obtain evidence, and from wholesale and retail dealers who were agents for the sale and distribution of plaintiff's iron. While, no doubt, testimony obtained subsequent to the commencement of the suit was properly admissible, yet we are of the opinion that its weight was, to some extent, impaired. Likewise not

controlling, but of some significance, is the fact that not a single bona fide customer for plaintiff's iron testified in behalf of the plaintiff."

The only other material evidence of confusion consisted of four instances in which persons who had purchased Pachmayr pads supposedly returned them to appellant for exchange. [R. 107-109; Exs. 12-14, 16.] From all that appears in the evidence, the customers knew that they were endeavoring to exchange new or used Pachmayr pads for appellant's pads. Certainly appellant and its salesmen had only to look at the pads (as did the purchasers) to ascertain that they were in fact manufactured by Pachmayr. When it is considered that appellee has sold more than 50,000 pads per year in each of the years since 1948 [R. 201], this evidence of confusion is decidedly flimsy. Appellee was not an insurer against confusion and is not required to make the market "fool-proof."

Kellogg Co. v. National Biscuit Co., 305 U. S. 111, 119, 59 S. Ct. 109, 83 L. Ed. 73;

Life Savers Corporation v. Curtiss Candy Co., 182 F. 2d 4 (C. C. A. 7).

Furthermore, "probable confusion cannot be shown by pointing out that at some place, at some time, someone made a false identification."

Sunbeam Lighting Co. v. Sunbeam Corp., 183 F. 2d 969, 974 (C. C. A. 9);

McGraw Hill Publishing Company v. American Aviation Associates, 117 F. 2d 293, 295.

Some attention may now be given to the matter of marking of the pads and of the packaging of appellant's

and appellee's pads. Both before and after the State Court action, all pads sold by appellant had the words "White Line" on top of the pad and also the words "Mershon Company, Inc., Glendale, California" across one end of the top of the pad. [R. 122.] Appellee's pad has always had the name "Pachmayr" or "Pachmayr Gun Works" on it. [See Exs. 8, 9, 19, 21, 23, 24.] Appellee has never used the words "White Line" on his pads or in his advertising which has been entirely in black and white. [R. 176, 179.] Even all pads manufactured by appellee on which a dealer's name is molded into the pad, the words "Custom made by Pachmayr" are always molded into the top of the pad adjoining the name of the dealer. [R. 151, Ex. 24.]

In the matter of packaging, it is hard to conceive how a greater dissimilarity could be achieved. As in the case of the pads and the advertising, all of appellant's boxes bear the words "White Line" and the words "Mershon Company, Inc., Glendale, California." [Exs. C, D, and E.] All of appellee's boxes are plainly marked on the front "Pachmayr Gun Works, 1220 S. Grand, Los Angeles 15, California" and the name "Pachmayr" also appears on the top and on both sides of the package. [Exs. 19, 21 and 23.] Appellant's boxes have been grey with green letters and lines, yellow with green letters and green with predominantly white lettering. [Exs. C, D, E.] Appellee's boxes have been predominantly blue with white printing, brown with white printing and red with white printing. [Exs. 19, 21 and 23; R. 167, 168.] Appellant's green package and appellee's red package have come into use since the State Court trial. [R. 125, 126, 167.] All of appellee's pads were packaged and sold in either the blue or red boxes as of the time of the trial in the District

Court. [R. 168.] Appellant's box shows a figure or design of a shield, a target and the letter "M" superimposed on the shield. Appellee's box depicts neither the shield, the target nor the letter "M" but does show a picture of a duck. [Exs. 19, 21 and 23.] In addition to the cases already cited, *Southern California Fish Company v. White Star Canning Co.*, *supra*, is particularly applicable to these facts. The Court said at pages 431, 433 and 435:

"Nor is plaintiff's case helped by the fact that dark blue, the color of the background, is the predominant color in both labels, though it is apparent that the gravamen of plaintiff's charge lies in an alleged imitative color scheme. It is the one specific feature emphasized by the plaintiff throughout its case. It is true that sometimes a color, taken in connection with other characteristics, may serve to distinguish one's goods, and thus be protected by the courts. (*Fairbanks Co. v. Bell Mfg. Co.*, 77 Fed. 869 (23 C. C. A. 554)—a case where, however, there was proof of specific instances of deception.) But as a rule a color cannot be monopolized to distinguish a product. There are not more than seven primary colors, and if one of these may be appropriated as a distinguishing characteristic of a label, it would not take long to appropriate the rest. Thus, by appropriating the colors, the packing of tuna could be monopolized by a few vigilant concerns. To allow colors to be appropriated as distinguishing characteristics would foster monopoly by foreclosing the use by others of any tasty dress; and where the difference between plaintiff's and defendant's labels are so marked in other respects that, in the absence of identity of color, there can be no possibility of confusion, a charge of unfair competition falls to the ground . . .

“ . . . In the case before us, aside from the features that are common to the trade—size and shape of can and general color scheme—that which specifically distinguishes the plaintiff’s label and which it may be claimed was taken by defendant—the figure of the fish—is not a subject of exclusive appropriation by either party . . . Plaintiff’s product is designated in its label as the ‘Blue Sea’ brand, defendant’s is designated as the ‘White Star’ brand; the name of each proprietor is stamped upon its respective label in large and distinct letters; and while purchasers desiring to buy canned tuna, without caring by whom it had been canned, doubtless would accept indifferently either plaintiff’s ‘Blue Sea’ brand or defendant’s ‘White Star’ brand, yet it is not at all likely that any ordinarily intelligent purchaser, exercising reasonable care, and who desired to buy ‘Blue Sea’ and not ‘White Star,’ would be led by any similarity of the respective packages to accept the latter supposing it to be the former.

“ . . . ‘One who so names and dresses his product that a purchaser who exercises ordinary care to ascertain the sources of its manufacture can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it, has fairly discharged his duty to the public and to his rivals, and is guiltless of that deceit which is an indispensable element of unfair competition.’ As regards plaintiff’s goods, if they have acquired a title or denomination in the market, the only title or denomination which they can have acquired is that of ‘Blue Sea’ brand of tuna; while as regards the defendant’s goods, if they have acquired or should acquire a title in the market, it is or will be the title of ‘White Star’ brand; and, aside from the color scheme, which is common to the trade, and the figure of the fish, which neither can

appropriate exclusively, the differences in the two labels are so many and so prominent as to negative any probability that an ordinarily intelligent buyer, exercising ordinary care, will ever be so far deceived by any resemblance of defendant's to plaintiff's label as to buy one of these brands of tuna when ordering or intending to buy the other."

Equally apposite is *Landis Machinery Co. v. Chaso Tool Co.*, 141 F. 2d 800, 804 (C. C. A. 6):

"The assertion of unfair competition is based upon the use by the defendant of metal boxes for its chasers identical with those of the plaintiff, made by the same manufacturer and of similar color. There is no evidence that the defendant made any effort to palm off its goods as those of the plaintiff, and there is no sound basis for drawing a conclusion that it intended to do so. *C. & W. Thum Co. v. Dickinson*, 6 Cir., 245 P. 609. There was little evidence of confusion. *The defendant's chasers were clearly marked 'Chaso' both on the container and on the chasers themselves, thus supplying the 'antidote with the bane.'* *Rymer v. Anchor Stove & Range Co.*, 6 Cir., 70 F. 2d 386; *Estate Stove Co. v. Gray & Dudley Co.*, 6 Cir., 41 F. 2d 462, 464 . . . Moreover the plaintiff has no exclusive right to the color it had adopted, *James Heddon's Sons v. Millsite Steel & Wire Works*, 6 Cir., 128 F. 2d 6, and there is no substantial proof that the color had come to have a secondary meaning denoting origin of its product. We find no error in the court's rejection of the plaintiff's contention that the defendant had engaged in unfair competition with it." (Italics ours.)

Appellant under its pleading and as a matter of law was required to prove that the white line of material on a gun recoil pad denoted to the public and particularly

to owners of and dealers in guns and gun supplies the gun recoil pad was the product of appellant and no one else. Appellant did not call a single member of the public or a single dealer in guns or gun supplies to testify on its behalf. Obviously, Gnagi knew the difference between the pads of appellant and appellee and even on his testimony so did the vast majority, if not all, of the dealers who were visited by Gnagi. On the other hand, appellee's evidence showed without dispute that generally purchasers of gun recoil pads do not ask for a pad by name or style. [R. 190.] Appellee's witness Francis L. Clark had owned and operated a gun shop since 1934. [R. 219.] He had handled both appellant's and appellee's pads since the time he ascertained that gun recoil pads were made locally. [R. 220.] He testified that he could easily tell the difference between the pads by virtue of the differences in the "tread," by the names of the manufacturers on the pads and by the differences in the boxes. [R. 221.] He further testified that no customer had ever expressed any confusion as to the respective pads. [R. 221.] It was stipulated that defendant's witness Arthur Edward Palfrey would testify to the same effect. [R. 222.]

Certainly, none of the evidence tends to show any intention to deceive or any actual deception and certainly, the Court was justified in finding that appellee was not endeavoring to practice deception. [R. 158-159.] Appellant's evidence showed that the use of a white line or lamination in a gun recoil pad is and, for a long time has been common to the trade. Since at least the seventeenth century laminations in contrasting colors on the butts of guns have been used. [R. 204.] Laminations of light-colored materials such as white have been par-

ticularly popular, in order to create contrast, since a light color more readily strikes the eye. [R. 204-5.] White rubber was used as a lamination as early as 1924. [R. 205-206.] White plastic material is known to have been used in 1929 or 1930. [R. 207.] Between 1922 and 1932 when appellee was learning to be a gunsmith under his father, and later operating his own business, substantially before L. E. Mershon had any connection with the business, appellee used a white line of material. [R. 159, 164-165.] At least since 1948, four other manufacturers of gun recoil pads have used a white line or lamination in their product. [R. 214-215.]

The case may properly be compared on all its essential facts with *Parker Pen Co. v. Finstone*, 7 F. 2d 753 (D. C. N. Y.). In that case it appeared that Parker Pen Co. had filed an application for a trade-mark for a fountain pen, the trade-mark consisting of “a red body portion and two black end portions . . . The trade-mark is applied to the goods by producing the same directly upon the pen body.” Parker Pen Company asserted causes of action based upon trade-mark infringement and unfair competition. The Court said at pages 754-755:

“It is in evidence that the defendant has manufactured and sold pens which bear a striking resemblance to the plaintiff’s pens, both having a red barrel with a black tip on each end. The plaintiff’s clip, however, is attached differently from that of the defendant, and the pens are further distinguishable by reason of the fact that plaintiff’s name appears on its pen, and the defendant’s designation appears on defendant’s pen. There is some evidence in the record of possible confusion in the mind of a purchaser as to the two pens, or possible con-

fusion between the plaintiff's pens and other pens, but I do not think the evidence sufficient to warrant the conclusion that this confusion has been brought home to this defendant by his unlawful imitation. The evidence, in substance, is merely to the effect that pens other than the defendant's, and possibly defendant's, have been confused with the plaintiff's.

"There is abundant evidence, however, before the court, that many manufacturers have used the color combination of red and black in the manufacture of fountain pens prior to the use by the plaintiff. . . . It is in evidence that the plaintiff sells pens in numerous color combinations, other than the ones set forth in the trade-mark, and in varying sizes. Defendant has sold pens since 1907. The Parker pen, for which the distinctive trade-mark and dress are claimed, has been made and sold for upwards of four years. The defendant made red and black pens prior to 1916.

"On the trial of this case the court stated to counsel, after considerable evidence had been received, that the court was then of the opinion that the evidence established conclusively that the use of red and black in the manufacture of fountain pens is not the subject of monopoly on the part of this plaintiff, or of any other plaintiff, that such use of color combination was conventional, and that these things have been in use for many years. After mature consideration of the entire record, the court sees no reason to come to a different conclusion. . . . The court again reiterates that it is of the opinion that plaintiff is not entitled to a monopoly in the use of red and black fountain pen barrels in the manner evidenced by the exhibits. It follows, therefore, that the registered trade-mark, in and of itself, is invalid.

“ . . . In the present instance, a casual purchaser might be confused by the similarity in appearance of plaintiff's and defendant's pens, when placed on display; but if the plaintiff has manufactured, as it would appear, a meritorious article, its name, 'Parker,' distinguishes it, and protects the public against deception. Certainly, if the court be correct in its conclusion, from the facts in this case, that the color combinations objected to and the mere size of defendant's pen are matters that are common to the trade, then the purchaser himself is chargeable with such knowledge, and is bound to examine the name on the label, or other markings, with sufficient care to ascertain the name of the manufacturer whose meritorious product he desires. *Coats v. Merrick Thread Co.*, 149 U. S. 562, 13 S. Ct. 966, 37 L. Ed. 847; *Columbia Mill Co. v. Alcorn*, 150 U. S. 460, 14 S. Ct. 151, 37 L. Ed. 1144.”

(b) Discussion of Appellant's Point I (b) (c) and (d).

It is felt that the evidence previously discussed, the cases already cited and the adverse decision of the District Court are themselves answers to the argument of the appellant.

However, it may be pointed out that the cases cited on pages 12-14 of appellant's brief involve a distinctive and unique symbol or design or a pictorial representation. Two of the cases involve a star; one involves a picture of a boar's head; another a picture of a serpent entwined on a staff and crown, and another a picture of the ship *Mayflower*. None involve a continuous colored line of material in the product or on the package or container, which it has been uniformly held cannot be the subject of

exclusive appropriation and use, either under the law of trademarks or under the law of unfair competition. Several of the cases are appeals, either from opposition or cancellation proceedings in the Patent Office, and are inapplicable to an unfair competition case. Without exception the cases are older than the principal cases relied upon by appellee; none is a California decision, or a decision by the Supreme Court of the United States.

An examination of *Enterprise Mfg. Co. v. Landers, Frary & Clark*, 131 Fed. 230, will show that on its facts, it bears no analogy to this case. The evidence there showed that the defendants were guilty of intentional and deliberate imitation in every possible respect and that they made no attempt to differentiate their product from that of plaintiff. (See p. 241.)

Appellant assumes correctly that the District Court determined that it was not entitled to the exclusive use of the color white in a line of material in the center of a gun recoil pad, on the theory that color alone is not subject to exclusive appropriation as a trade-mark. While conceding the correctness of this principle, appellant has consistently referred to the white line of material as a "symbol" and assumes, without citing a single case to support the proposition, that a continuous line of colored material in a product placed between two contrasting shades of material constitutes a distinctive and arbitrary symbol or design. Appellee submits that appellant cannot produce a case in point, and that the cases have consistently held that a colored line of material in a product does not con-

stitute the type of arbitrary and unique symbol or design which is the subject of trade-mark appropriation.

Samson Cordage Wks. v. Puritan Cordage Wks.,
(C. C. A. 6), 211 Fed. 603, 607;

Newcomer & Lewis v. Scriven Co. (C. C. A. 6),
168 Fed. 621, 623;

*A. Leschen & Sons Rope Co. v. Macomber &
Whyte Rope Co.* (C. C. A. 6), 142 Fed. 289;

Burgess Battery Co. v. Marzall (D. C. D. C.,
1951), 101 Fed. Supp. 812, holding that alter-
nate vertical light and dark stripes cannot be
registered as a trade-mark for storage batteries;
that this is merely ornamental dress, is not dis-
tinct and arbitrary and does not and inherently
cannot have any trade-mark significance).

Many of the cases already cited stand for the same general principle. It is clear that whether the theory advanced is trade-mark infringement or unfair competition, one who seeks to establish an exclusive right to the use of a particular color used in a product and which is not used as a part of a unique or distinctive form or design cannot prevail. See in addition to the cases already cited:

*James Heddons' Sons v. Millsite Steel & Wire
Wks.* (C. C. A. 6), 128 F. 2d 6, 9, cert. den.
317 U. S. 674;

Radio Corp. of America v. Decca Records, 51 Fed.
Supp. 493, 495;

Cf. Sunbeam Lighting Co. v. Sunbeam Corp. (C.
C. A. 9), 183 F. 2d 969, 973.

(See cases collected in 61 Fed. Digest, Section 43(d).)

(c) The Findings of the Trial Court Are Not Clearly
Erroneous.

Although appellant in his specification of errors has stated generally that the trial court was in error in adopting findings which are not supported by the evidence, on the issue of unfair competition and trade-mark infringement, it has not asserted that the findings are not sufficient to support the judgment nor has it pointed to any finding which was not supported by substantial evidence. Appellant has overlooked entirely the effect of Rule 52(a), Federal Rules of Civil Procedure and is in effect, asking that this Court “try the case *de novo* on the record.”

Goldstein v. Polokof (C. C. A. 9), 135 F. 2d 45.

In this connection, reference may be made to a few of the many decisions of this Court. A presumption of correctness attaches to the findings of the District Court. Where the evidence is conflicting, this Court will not substitute its judgment for that of the trial court, but will view the evidence most favorably to the prevailing party. If, when the evidence is so viewed, the findings are supported by substantial evidence, they will be sustained.

Paramount Pest Control Service v. Brewer (C. C. A. 9), 177 F. 2d 564, 567.

Where a Court has considered conflicting evidence and made a finding or decree it is presumptively correct and unless some obvious error of law has intervened or some serious mistake of fact has been made, the finding or decree must be permitted to stand.

Wingate v. Bercut (C. C. A. 9), 146 F. 2d 725, 728.

Where the evidence is conflicting the findings of the trial court will not be disturbed unless clearly against the weight of the evidence or unless plain or manifest error exists.

Faivret v. First National Bank in Richmond (C. C. A. 9), 160 F. 2d 827, 829.

Other Circuit Courts have held that the trial court's finding that there was no unfair competition or trademark infringement will be not disturbed, where it is supported by substantial evidence and not clearly erroneous.

Magazine Publishers v. Ziff-Davis Pub. Co. (C. C. A. 2), 147 F. 2d 182, 185;

Dwinell-Wright Co. v. National Fruit Product Co. (C. C. A. 1), 140 F. 2d 618;

James Heddons' Sons v. Millsite Steel & Wire Works, 128 F. 2d 6, 13.

However, whether the case is considered *de novo* or whether the rule applicable on appeal where the evidence is conflicting is applied, it is submitted that the decision of the District Court was eminently correct.

Respectfully submitted,

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No. 13334.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MERSHON COMPANY, INC.,

Appellant,

vs.

FRANK A. PACHMAYR, and FRANK A. PACHMAYR, doing
business under the fictitious firm name and style of
PACHMAYR GUN WORKS,

Appellees.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

Re: Issue of Res Judicata.

In their opening brief, appellant carefully reviewed the law relating to what is concluded by a former judgment relied upon as *res judicata* in a later action. This law may be summarized as follows:

“A judgment is conclusive only as to those findings which are necessary for its support.”

Chapman v. Hughes, 134 Cal. 649, 654-655.

The authorities cited in appellees' brief do not hold otherwise. In each of the cases cited in appellees' brief, the matters or findings which were found to be concluded

by the former judgment *were necessary for the support of that judgment*. For instance, in *Bank of America v. McLaughlin*, 40 Cal. App. 2d 620, principally relied upon by appellees, the matters and questions referred to in the findings in the former action were not only necessary for the support of the judgment, but they were also recited in the judgment—neither of which is true of the former judgment relied upon by appellees here as *res judicata*.

In the former action with which we are here concerned, the judgment in which is relied upon by appellees as constituting *res judicata*, there were two inconsistent defenses: (1) that the action was barred by an agreement under which the defendants (appellees here) agreed to and did abandon use of the White Line symbol, and plaintiff (appellant here) agreed to waive suit therefor; and (2) that the use of the White Line symbol by said defendants did not constitute unfair competition. On appeal, the District Court of Appeal determined that the action was barred by said agreement and that the matter of whether or not use of the White Line symbol constituted unfair competition was immaterial.

The present action is merely for the resumption of the use of the White Line symbol by the defendant after he obtained that judgment, and does not seek any relief for acts committed during the period covered by the former action.

The question here, therefore, is really one of whether the former judgment creates an *estoppel*, rather than one of *res judicata*; and it is submitted that the defendant's acts in obtaining the former judgment upon the representation to the Court that he had abandoned use of the White Line symbol and then deliberately resuming its use after

obtaining the judgment upon that premise, is inequitable conduct which would bar appellees from invoking the estoppel even if the former judgment were capable of creating an estoppel.

Re: Issue of Trade-mark Infringement and Unfair Competition.

In their opening brief, appellant cited authorities unanimously supporting the rule that where a trade-mark consists of both words and a symbol, both having the same meaning, it is trade-mark infringement or unfair competition for another to use *either* the words or the symbol. Appellees have not cited any contrary authority.

Here, appellant's mark consists of the words "White Line" and also of the White Line symbol. Appellant's pads are advertised and marked as "White Line" pads. It appears too obvious to admit of argument that if appellees should be permitted to use either the symbol or the words, confusion is bound to result—and the undisputed evidence shows actual confusion.

The Complaint and Answer in the Former Action Do Not Appear to Be Before the Court.

In their opening brief, appellant made the statement that there was not before the Court sufficient of the proceedings in the former action to enable the Court to determine what facts were referred to in the findings in the former action; that while the findings and conclusions were placed in evidence [R. 239], the complaint and answer, to which the findings refer by reference, were not placed in evidence. Appellees' brief contradicts this statement.

Attention is directed to the fact that, according to the record, although appellees did start to place the complaint and answer in evidence, the following colloquy took place [R. 217-218]:

“The Court: * * * I might say to counsel that, unless I change my mind, I am not going any further back than the findings and judgment. I am not going to retry that case. * * *

Mr. Hamblin: That is correct. *I think the findings and conclusions are all that need to be offered.*”

Conclusion.

Appellant therefore again submits that the judgment appealed from should be reversed.

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No. 13334
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

MERSHON COMPANY, INC.,

Appellant,

vs.

FRANK A. PACHMAYR, and FRANK A. PACHMAYR, doing
business under the fictitious firm name and style of
PACHMAYR GUN WORKS,

Appellees.

PETITION FOR REHEARING.

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IN THE

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business under the fictitious firm name and style of
PACHMAYR GUN WORKS,

Appellees.

PETITION FOR REHEARING.

Appellee herein respectfully petitions this Honorable Court for a rehearing of its decision filed herein on March 14, 1955, upon each of the following grounds:

I.

**On the Question of Res Judicata This Court's Decision
Is Erroneous.**

On the point of *res judicata* the only thing decided by this Court is that the facts and issues in the state and federal cases are so "vastly different" that no phase of *res judicata*, or of estoppel by judgment, can be maintained. (Op. p. 6.)

In reaching this conclusion this Court has mentioned four (4) points of distinction, which are set forth below:

(1) It is said that “the acts complained of in the federal case are acts performed at dates later than those in issue in the state case.”

(2) It is said that “the decision of the state case is based upon the Mershon—Pachmayr ‘not to sue, not to continue use of the mark’ agreement.”

(3) That the decision of the Superior Court was merely to the effect that the advertisement in the magazine “Field and Stream” did not alone constitute unfair trade.

(4) That the cases are different because this Court infers that there was no substantial manufacture and sale of pads with the white line up to the time of the state court’s decision.

Before analyzing these points, appellee reminds this Court that it has several times decided that the question of application of the principles of *res judicata* is a question of California law.

Nev-Cal Elec. Securities Co. v. Imperial Irrigation Dist., 85 F. 2d 886, 898;

Larber v. Vista Irrigation Dist., 127 F. 2d 628, 634.

We have heretofore relied and will continue to rely upon California decisions, except that two federal decisions are particularly apposite because they are unfair competition or trademark decisions. We shall analyze the four grounds of distinction mentioned by this Court in the order in which they are set forth above.

(1) To say that a prior judicial decision which authorizes the doing of a specific act may be collaterally challenged and the same act now forbidden, is to destroy the doctrine of *res judicata*. The judgment in the state case [R. pp. 245-246] when read with the findings of fact and conclusions of law of the Superior Court [R. pp. 239-244] established that Pachmayr had a legal right to manufacture, advertise and sell recoil pads incorporating a white line of material in the pad between two other contrasting colors of material; that such an action did not constitute unfair competition and that Mershon had no right either to enjoin these actions on the part of defendant, or to damages, general or special, or to any other relief. [R. pp. 240, 246.] Other findings of fact, as to which there is necessarily an estoppel, and which cannot now be disputed or relitigated by appellant in the present case, are set forth at pages 4-6 of appellee's brief and need not be repeated in full here.

In the present action there was undisputed evidence that Pachmayr's recoil pads, in so far as the white line of material is concerned, were no different at the time the federal case was commenced than they were when the state case was instituted. At no time did Pachmayr use or advertise the words "White Line". [R. pp. 102, 179-180.] He invariably and continuously marked his recoil pads with the words "Pachmayr" or "Pachmayr Gun Works". [R. pp. 151, 168; Exs. 8, 9 and 10.] The same dissimilarity in the colors and markings of packages has been continuous. [Exs. C, D and E, 19, 21 and 23.] The only change in all of these facts is that since the state court trial, Mershon has used a green package which Pachmayr has never used and Pachmayr commenced the use of a red package, which color Mershon has never

used. [R. 125, 126, 167.] If the doctrine of *res judicata* has any force, how can the same acts which were held not to constitute unfair competition in 1948 become unfair competition in 1951. The fundamental purpose of both aspects of the doctrine of *res judicata* is to grant protection for continuing acts which have been held legal by a final judgment of a court of competent jurisdiction.

Sutphin v. Speik, 15 Cal. 2d 195, 99 P. 2d 652, was not cited in appellee's brief because the decision was well summarized in one of the cases which was cited. (See Appellee's Br. p. 22.) However, in view of this Court's decision, the foregoing leading decision of the Supreme Court of California deserves further analysis. The following quotation from the decision is an adequate exposition of the facts and the law announced in that case:

"The prior judgment, as will be seen from an examination of its provisions and of the foregoing excerpts from the findings and conclusions, determined that plaintiff was the owner of 5 per cent of the total production of the two wells. This determination in the prior judgment necessarily establishes plaintiff's right in this action to recover royalties based on subsequent production of wells 3A and 4, unless defendant's attack on the applicability of the doctrine of *res judicata* is successful.

"The contentions of defendant in this connection are as follows: (a) *The causes of action in the two suits are different, and the judgment in the first is not res judicata in the second.* (b) The issue of ownership of oil or rights therein produced from state lands by a 'whipstock well' was not raised or decided in the first action, and is not *res judicata*. (c) Defendant Speik, after the judgment in the first action, acquired an independent title to the oil from the state lands which he could not have set up in the first

action. *The defendant argues that the estoppel of a judgment extends only to facts and conditions as they were at the time the judgment was rendered.*

(d) The language in the prior judgment and in the District Court of Appeal opinion, which would purport to establish a right in such oil, went beyond the issues raised and is surplusage and void. In this connection it is argued that the District Court of Appeal merely affirmed and did not modify the judgment; hence, its opinion cannot enlarge the scope of the judgment.

“All of these contentions merely represent different methods of expressing the single defense that the assignment to plaintiff and the prior judgment in his favor were only intended to give to plaintiff a right in oil produced from a particular well or any ‘substitute therefor’ drawing oil from strata directly underlying the leased premises; and that neither was intended, nor could be construed to establish in plaintiff any right to oil drawn through that well or any other well where the oil itself came from strata not underlying these lots.

“The argument of defendant is, in substance, an attack upon the findings and judgment in the prior action, the undoubted purpose of which is to avoid the broad determination of the issues therein made. The assignment upon which plaintiff relies covered the original well number 3 (subsequently destroyed by fire) or any ‘substitute therefor.’ It was entirely within the issues of the first action for the court to determine whether wells number 3A or 4 or any other wells then on the premises were substitutes for the original and destroyed well number 3. It is clear from an examination of the findings and judgment therein that plaintiff was adjudged in the prior action to be entitled to his percentage of the produc-

tion of any wells then drilled on the particular premises regardless of where the wells were bottomed, or the source of the oil delivered by them.

* * * * *

“As already indicated, defendant’s contention that the doctrine of *res judicata* is not applicable here is grounded upon the proposition that the causes of action involved in the prior and present suit are different, and that the defenses that title had been acquired from the state, and that the oil was being taken from lands outside the boundaries of the lots, were not raised in the prior action. A complete answer to this contention may be found in an examination of the scope of the doctrine of *res judicata*, which has been fully considered by this court in recent cases.

“First, where the causes of action and the parties are the same, a prior judgment is a complete bar in the second action. This is fundamental and is everywhere conceded.

“Second, where the causes of action are different but the parties are the same, the doctrine applies so as to render conclusive matters which were decided by the first judgment. As this court said in *Todhunter v. Smith*, 219 Cal. 690, 695 (28 Pac. 2d 916): ‘A prior judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.’ In the instant case, for example, the severable installments of royalties due gave rise to separate causes of action; but a determination of a particular issue in the prior action is *res judicata* in the second action. (See, also,

Pratt v. Vaughn, 2 Cal. App. 2d 722 (38 Pac. 2d 799).)

“Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? *Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment.*

* * * * *

“The judgment in that action awarded plaintiff 5 per cent of the total production from the lots in question whether produced from one or more wells. That judgment, correctly or incorrectly, did not limit the right of plaintiff to production from wells which bottomed under the land. After that judgment became final, plaintiff’s right to a portion of the production from those wells was conclusive as between the parties, even in the present suit on a different cause of action, because the basic issue thus decided in the first case is identical with that in the present case. Defendant, in his petition, has again urged that the former judgment cannot be *res judicata* as to the new issue of the title to oil from wells bottomed on state land, which title was acquired after the conclusion of the first action. The difficulty with this argument is that the asserted ‘new issue’ is not such in fact. Defendant has simply offered another legal theory by which the same issue might be differently decided. If he may have a new trial of the issue of right to the production of the oil from these wells because of the new argument that the source of the oil must be considered, then it would seem that in subsequent action he can raise a ‘new issue’ as to the title of A, B, C, or other possible claimants in addition to the state. *In short, defendant’s contention is that though the prior judgment determined that plaintiff had a right to a specified percentage of the production of oil from any wells on certain*

land, plaintiff may be compelled to relitigate that right whenever defendant can discover a new theory upon which to attack it. This proposition is without support in principle or authority.” (Italics ours.)

In our case the prior judgment determined the same basic issue involved in this case, namely, that Pachmayr had a right to use the white line of material in his gun recoil pad. He cannot be compelled to relitigate that right merely because plaintiff in this case has alleged a trademark cause of action, nor on the basis of this Court's conclusion that the case is different because the same acts were performed at a later date.

It is appropriate at this point to cite two federal cases dealing with the question of *res judicata* in unfair competition or trademark situations. These cases were cited and discussed in memoranda filed with the United States District Court, but were not mentioned in appellee's brief:

E. I. du Pont de Nemours & Co. v. Sylvania Industrial Corporation, 122 F. 2d 400, was an action for trademark infringement and unfair competition. Du Pont asserted the exclusive right to the use of the term “cellophane.” In litigation resulting in a judgment in 1934 du Pont had been unsuccessful. Up to that time Sylvania had sold the product but first used the term “cellophane” in its advertisements in December, 1936, and on its goods in November, 1937. The Court of Appeals held that in the previous action it had been determined that the word “cellophane” was not a valid trademark, and that Sylvania was entitled to the benefit of the favorable decree even though it had not been a party to the earlier action, and had not advertised or used the name “cellophane” on its goods until after the earlier decision in the District Court.

In *National Circle, Daughters of Isabella v. National Order, Daughters of Isabella* (C. C. A. 2), 270 Fed. 723, the Court said at pages 728 and 729:

“We admit that the cause of action in the case is not identical with the one alleged in the instant case. We admit that the judgment in that case only enjoined the defendants from using the name ‘Daughters of Isabella’ within the State of Connecticut. But we do not agree that the Connecticut action settled nothing which can in any way affect the rights of the parties in the present suit.

“The findings of the Connecticut court are conclusive upon the parties to that litigation, and they are as conclusive outside of Connecticut as they are inside of the state. And one of the issues of fact which it conclusively determined was that the Connecticut organization used the words ‘Daughters of Isabella’ for several years before the defendant was organized. And another issue of fact which it in substance determined was that the present plaintiff is the successor of the voluntary association which in 1901 appropriated the name ‘Daughters of Isabella.’

“The Connecticut court was not asked to restrain the defendant from the use of its name outside of that state or from establishing branches outside of the state of Connecticut, so that the decision then rendered was not intended to restrain and did not restrain the defendant from doing the things complained of in the present suit. The present action seeks to restrain the defendant from doing anywhere in the United States what the Connecticut court restrained it from doing in that state. But the findings of fact in the Connecticut action, in which the present plaintiff and the present defendant were parties plaintiff and parties defendant, must be regarded as *res adjudicata* between them. The findings of the court

as to the essential facts are conclusive between the parties in all subsequent judicial proceedings as long as the judgment remains unmodified. They are not only final in the state where the judgment was rendered, but they are final in every other state.”

(2) Another point of dissimilarity suggested by this Court is that the decision of the state case is based upon the Mershon-Pachmayr “not to sue, not to continue use of the mark” agreement. Thus, by inference, this Court says that nothing was decided by the state Superior Court except that Pachmayr had not violated the “not to sue, not to continue use of the mark” verbal agreement. This Court has failed to follow the California law, and has rendered a decision directly contrary to the latest California decision on the point.

Evans v. Horton (Jan. 1953), 115 Cal. App. 2d 281, 251 P. 2d 1013,

was decided after appellee’s brief was filed herein. The plaintiff on the appeal in that case made exactly the same contention in principle which is made by appellant in this case. That is, in the *Evans* case, the state Superior Court had found, among other things, that the plaintiff had not taken all necessary steps to rescind the transactions which he claimed to be fraudulent. Plaintiff claimed, in effect, that this was the only point decided and that the findings of want of fraud were surplusage and not necessary to the judgment, and therefore the judgments were not *res judicata* on the question of fraud. So, here, this Court has said that in the state Superior Court decision [R. p. 243], the latter decided only that the oral agreement had not been broken by Pachmayr, and therefore, in effect, all other findings are immaterial and

may be disregarded. The answer to this contention is found in the recent decision in *Evans v. Horton*. The Court there said, at pages 285 and 286:

“Plaintiff argues that because the court, in the prior actions, found he had not taken all necessary steps to rescind the Mothimune transactions the findings of want of fraud were surplusage, not necessary to the judgments, and therefore the judgments are not *res judicata* on the question of fraud. The rule invoked by plaintiff applies only when the issue was immaterial to the decision of the prior case, or was only incidentally cognizable, or only collaterally in question. (50 C. J. S. 206, Secs. 721-725; Anno. 133 A. L. R. 840.) In general, a fact, question, or claim is within the doctrine of *res judicata* when an issue concerning it is tendered and accepted by the pleadings in the case and is determined on the merits. (*Clark v. Bauer*, 135 Cal. App. 65, 69-74 (26 P. 2d 729); *Bank of America v. Feig*, 21 Cal. App. 2d 247 (68 P. 2d 985). See *Keidatz v. Albany*, 39 Cal. 2d 826 (249 P. 2d 264).) *Unless expressly excluded from the effect of the adjudication, if the question involved in a suit are tried and decided, no matter how numerous they may be, the estoppel of the judgment applies to each point so settled in the same degree as though it were the sole issue in the case.* (50 C. J. S. 208, Sec. 721.)

“A court is not confined to a single point or ground in deciding an action. Where a court has decided an action on more than one ground, it cannot be said that one ground rather than the others was essential to the decision, and that the others were immaterial or unnecessary. *In determining the conclusiveness of a finding or holding on a certain point, the inquiry is not whether the court might have avoided making a finding on the particular point but whether the find-*

ing or holding is on a point in issue and whether it is consistent with, and supports or contributes to, the actual decision rendered. A judgment based on several grounds or points, each of which was put in issue by the pleadings and expressly decided, is conclusive as res judicata or estoppel as to each of such grounds or points. (See cases collected—133 A. L. R. 846.) If a case is decided on one or more grounds, each ground is a good estoppel. (Irving Nat. Bank v. Law (2 Cir.), 10 F. 2d 721, 724. See Dobbins v. Title Guar. & Trust Co., 22 Cal. 2d 64, 70-71 (136 P. 2d 572).) Mr. Freeman says: 'But there is a difference between a finding or adjudication which is immaterial and one which is material, though perhaps unnecessary in view of other findings. The mere fact that the court goes further than is absolutely necessary to sustain its judgment in determining material issues presented to it does not prevent such issues from becoming res judicata.' (2 Freeman on Judgments, 1478, Sec. 698.) The question of fraud in the Mothimune transactions was not immaterial to the decisions in the prior rescission suits, nor was it only incidentally cognizable nor only collaterally in question. *It was tendered and accepted by the pleadings; it went to the merits of the suits; it was litigated; expressly decided; and is res judicata. (See Henderson v. Miglietta, 206 Cal. 125 (273 P. 581.).)*" (Italics ours.)

In the state case appellant here clearly did not bring a declaratory relief action to have it determined whether or not Pachmayr had violated the "not to sue, not to continue use of the mark" verbal agreement. To the contrary. Mershon in the complaint in the state case [Ex. P-1; R. p. 217], pleaded a typical action for unfair competition and asked for an injunction and damages. The

issue of unfair competition was therefore tendered by the pleadings, it went to the merits, and was litigated and expressly decided. The oral agreement “not to sue, not to continue use of the mark,” was first tendered by Pachmayr as an affirmative defense in his answer. [Ex. P-2.] The issue raised by this affirmative defense was litigated and decided, but under the doctrine of *Evans v. Horton, supra*, it cannot be said that a decision on this issue made all of the other issues immaterial. The issue of unfair competition was still basic, and in so far as the causes of action in the state and federal cases are the same, the prior judgment is a complete bar in the second action. Even if it be said that a trademark cause of action is a different cause of action, the state court judgment is conclusive as to all matters of fact that were decided therein. However, as has been pointed out, the state court did determine the validity of appellant’s common law trademark (Appellee’s Br. pp. 14 and 15); as a matter of law, in this field at least, a trademark cause of action is not a different and distinct cause of action from an unfair competition case (*Armstrong Paint & Varnish v. Nu-Enamel Corp.*, 305 U. S. 315, 324-325, 83 L. Ed. 195, 59 S. Ct. 191; Appellee’s Br. pp. 15-16), and in any case, when it was determined as between these parties in the state court that there was no unfair competition, then as a matter of law there cannot be any trademark infringement. (See cases cited in Appellee’s Br. pp. 16 and 17.)

(3) This Court has further tried to differentiate the state court case by stating in substance that the Superior Court held that the advertisement in “Field and Stream” did not constitute unfair trade. Clearly the findings and conclusions of law in the state case are far broader than this Court infers. Beyond question the state court held

that neither the manufacture, advertisement, promotion or sale by Pachmayr of gun recoil pads with a white line of material in them constituted unfair competition. Any reasonable consideration of the finding of the state court will show that it did not confine itself to the determination of the legal effect of a particular advertisement.

In paragraph V of the complaint in the state court [Ex. P-1] it was alleged "that plaintiff at no time authorized the defendants in any manner to use said 'White Line' Recoil Pad design, or to advertise, or to promote, or to exploit, or to sell the same to any person or persons. . . ." The state court specifically found that this allegation was untrue and that "plaintiff's predecessor in interest did authorize defendant to advertise and promote and exploit and sell a recoil pad of a type similar to that being manufactured by plaintiff, provided no sale or manufacture thereof should be made prior to the 24th day of December, 1938; that prior to the 24th day of December, 1938, defendant did not advertise or promote or exploit or sell recoil pads. [R. p. 241.] Here was another issue which was tendered and accepted by the pleadings and which went to the merits and which was litigated and expressly decided and is therefore *res judicata* between these parties.

Evans v. Horton, supra.

Parenthetically the same point was raised by Pachmayr's fifth defense in the federal case [R. pp. 25-26], and was the subject of evidence and argument and a

finding in the federal case. [R. pp. 53-54, 158-163, 199.] In view of the state court's determination that Mershon specifically authorized Pachmayr to manufacture, sell and exploit a recoil pad with a white line of material in it, commencing on and after December 24, 1938, how can this Court now say that such manufacture and sale constitutes unfair competition and trademark infringement. It is submitted that the decision on the point now under discussion is alone sufficient to foreclose Mershon in the present action.

(4) This Court has said in substance that the finding of the state court respecting validity and performance of the verbal agreement between the parties indicates that there was no extensive trade in gun recoil pads at the time of the state court's decision. We respectfully urge that such a conclusion is a *non sequitur* and that it is not justified by the state court's findings. These findings were certainly to the effect that both Mershon and Pachmayr here were selling large quantities of recoil pads. The actual finding on the extent of manufacture and sale is as follows:

“That it is true that plaintiff manufactured, advertised, promoted, exploited and sold throughout the nation said white line recoil pads, *by expenditure of substantial sums of money and that plaintiff, through promotion, advertising and selling, has developed through the years a large and profitable business in the manufacture and sale of said white line recoil pads.*

“That as to all other allegations in paragraph III of plaintiff’s complaint, none of them is true.

IV.

“That it is true that on or about September, 1945, defendant began to sell and advertise recoil pads and that defendant from and after said date and until April 17, 1946, continued to advertise and sell recoil pads of the same general type as those sold by plaintiff; *and that the defendant did sell large quantities of such recoil pads.*” [R. p. 240.]

Furthermore, if the conclusion of the state court was, as we submit, that the manufacture, advertisement and sale of gun recoil pads with the while line of material, by Pachmayr, was not unfair competition, then it can scarcely matter whether at that time Pachmayr was manufacturing and selling ten thousand or one million pads per year. The Supreme Court of the United States has held that the fact that the amount of money spent on advertising has increased is without legal significance. (*Kellogg Co. v. National Biscuit Co.*, 305 U. S. 111, 119, 83 L. Ed. 73, 59 S. Ct. 109—Appellee’s Br. p. 20.) If the amount of money spent on advertising is without legal significance it would seem to follow that the number of units manufactured and sold is without legal significance, so long as the right to manufacture and sell *any* units has been established by a previous final judicial decision.

If we are correct that the factual distinction between the two cases under the California law is insufficient, then this Court should review and rehear the entire

argument on the *res judicata* issue. In that view, it is necessary for this court to decide whether or not the general affirmance by the District Court of Appeal of the judgment of the Superior Court affirms the judgment and the findings of the conclusions in their entirety. The effect of the decision of the state District Court of Appeal was fully discussed at pages 7-14 of Appellee's brief and the argument there made need not be repeated here. However, the argument on that point, and the argument made herein with regard to the effect of the findings and conclusions of the state Superior Court, is fortified by a recent decision of the California District Court of Appeal (*City of Vernon v. City of Los Angeles* (Oct. 1954), 128 A. C. A. 294, 275 P. 2d 72, rendered after the filing of appellee's brief herein. The court there said (128 A. C. A. at 305):

“The abatement judgment having been affirmed, it is a final decision and its holdings are unalterable. The contention that ‘the issues created by . . . Vernon’s answer in the abatement case were not passed on by the court and were not judicially determined’ is contrary to law. It is firmly entrenched in the corpus juris of this state that all issues raised by the pleadings are adjudicated by the judgment entered. Judge Palmer’s reaction to such contention is a final disposition thereof: ‘When an appellate court affirms a judgment of a trial court, makes no modification, orders no change in findings, conclusions or judgment, the only existing judgment . . . to which we can look for authority is the judgment of the trial court.’”

II.

As a Matter of Law the White Line of Material Involved Herein Is Not and Cannot Be the Subject of a Valid Trademark.

Petitioner does not, indeed cannot, dispute the rule of law advanced by appellant and adopted by the opinion of this court to the effect that “color” may in a particular case be a protected and integral part of a valid trademark, if that color is connected and impressed in a definite arbitrary design or symbol so as to distinguish the product.

However, it is and has been petitioner’s position that this exception to the rule that color may not be monopolized and protected is inappropriately and improperly applied to the present case.

The initial question involved is whether or not the color involved is used in some form of distinctive design or symbol that is uncommon and unique so as to distinguish the individual product.

Campbell Soup Co. et al. v. Armour (3 Cir., 1949), 175 F. 2d 795;

Diamond Match Co. v. Saginaw Match Co. (6 Cir., 1906), 142 Fed. 727, 729.

In *Campbell Soup Co., et al. v. Armour, supra*, where plaintiff’s labels contained bands of red and white the court states:

“The primary colors are few, and as the evidence shows those suitable for light products, such as milk, are even more limited. To allow them to be appropriated as distinguishing marks would foster monopoly by foreclosing the use by other of any tasty dress.

* * * * *

“When we say that plaintiff cannot have exclusive right to a trade-mark of a red and white label, we are by no means denying their right to acquire a trade-mark when the color is combined with other things in a distinctive design. As a matter of fact, the distinctiveness of plaintiffs’ packages does not depend upon color alone, although each has been granted registration of a trade-mark described in terms of color. Each has its name in one of the color bands in a uniform and specified type of script. Each has a very distinctive design on its label. Carnation has a small bouquet of carnation flowers. Campbell has a medallion of individual design. Armour, too, does not depend upon color alone. It uses different colors with different products and each has the Armour name in an individual type of script accompanied by the star which it says has been the mark of its good over many years. In denying the plaintiffs the exclusive use of color alone we are not passing upon the question whether they have acquired trade-marks entitled to protection in the sum total of the combinations which make up their respective labels for their goods.”

In the instant case, even assuming that the color contended for was other than white or black, the use of a mere line, end or portion of the product cannot constitute a design or figure sufficient to permit the monopolization of that color.

This is ably pointed out not only in the foregoing authorities, but by the facts and decision in *Turner and Seymour Mfg. Co. v. A. & J. Mfg. Co.* (2 Cir., 1927), 20 F. 2d 298, wherein plaintiff held a registered trademark for “Blue Whirl” egg beaters and “Blue Streak” can openers and defendant produced and sold a “Blue Tip”

egg beater and can opener. Both of the products of plaintiff and defendant contained a portion of the handles enameled in blue. The court therein states:

“Plaintiff’s egg beater is sold under the trade-mark ‘Blue Whirl,’ with both handles enameled a robin’s egg blue. It is sold in a blue box, one to a box. On the box is printed a guaranty of the excellence of the material and unlimited replacement. The defendants sell their egg beater under the trade-mark of ‘Blue Tip.’ Extensive advertising and sales effort has been carried on by the plaintiff, and the claim is that the public associates the blue handle, the blue name, and the blue box with both the egg beater and the can opener which the plaintiff manufactures. The defendants sold their ‘Blue Tip’ egg beater and can opener about two years after the ‘Blue Whirl’ appeared on the market and about one year after the ‘Blue Streak.’

* * * * *

“Ordinarily, colors of themselves cannot be appropriated as trade-marks. *Smith-Kline & French Co. v. American Druggists Syndicate* (C. C. A.), 273 F. 84; *Lalanc & Grosjean Mfg. Co. v. Nat’l Enameling & Stamping Co.* (C. C.), 109 F. 317. But color which is non-functional and distinctive in a drink, as in *Coca-Cola Co. v. Gay-Ola Co.* (C. C. A.), 200 F. 720, or whisky, as in *Walker v. Grubman* (D. C.), 222 F. 478, may not be copied in violation of an established mark, and has been held to be in fraudulent competition. The use of blue by both plaintiff and defendants, which color is common to the trade for kitchen utensils, and for which the plaintiff has no exclusive right, will not be protected by injunction, so as to afford it a monopoly. *Taylor v. Bostick* (C. C. A.), 299 F. 232. As there said:

“‘It is a well-settled general rule of law that a trader may not monopolize a particular color, and that color alone, unaccompanied by any distinguishing sign, seal or symbol, is not sufficient to constitute a trade-mark.’

* * * * *

“In view of the use of the word ‘blue’ and the color in the trade of manufacturing and marketing kitchen utensils, and the slight evidence of confusion, if any, there was no basis for an injunction as in restraint of plaintiff’s trade-marks. We hold that the trade-mark ‘Blue Tip’ does not infringe ‘Blue Whirl’ or ‘Blue Streak.’ ”

It is difficult to comprehend how the white portion of laminated rubber is any more of a distinctive design than the enameled handles to the products in the foregoing authority.

Certainly appellant cannot contend that a color not otherwise used in the form of a design or symbol can be monopolized merely by the selection of a trade name containing a word descriptive of that color, any more than the words “Blue Streak” or “Blue Tip” monopolizes the production and sale of blue handles on kitchen utensils. (*Turner and Seymour Mfg. Co. v. A. & J. Mfg. Co., supra.*)

It has also been established that one of the important factors in cases involving the use of color is the extent of usage of that color in the particular business or industry.

In the present case it was shown that the color white was functional in the sense that it was used in order to create contrast with darker colors, and because it more

readily strikes the eye. It was also shown that since 1948 four other manufacturers of gun recoil pads have used a white line or lamination in their products. This evidence was certainly sufficient to demonstrate that the use of white as a contrasting color in a gun recoil pad was not purely arbitrary, and that the use of such a color was old and common to the trade. The evidence on this point was set forth with citations of the record at pages 41 and 42 of Appellee's Brief, and need not be repeated here.

In this connection the Supreme Court has stated in *Kellogg Co. v. National Biscuit Company*, 305 U. S. 111, 120, 83 L. Ed 73, 59 S. Ct. 109:

"Where an article may be manufactured by all, a particular manufacturer can no more assert exclusive rights in a form in which the public has become accustomed to see the article and which, in the minds of the public, is primarily associated with the article rather than a particular producer, than it can in the case of a name with similar connections in the public mind. Kellogg Company was free to use the pillow-shaped form, subject only to the obligation to identify its product lest it be mistaken for that of the plaintiff."

See also:

Turner & Seymour Mfg. Co. v. A. & J. Mfg. Co.,
supra;

Parker Pen Co. v. Finstone, 7 F. 2d 753 (Appel-
lee's Br. p. 42);

*So. California Fish Co. v. White Star Canning
Co.*, 45 Cal. App. 426, 430, 187 Pac. 981 (Ap-
pellee's Br. pp. 29-30).

Petitioner further contends that even assuming, arguendo, that a single line of one color is a sufficient design or symbol to qualify in this respect for protection under the trademark laws, there are further reasons preventing the establishment of such a trademark.

It is now established that trademark protection differs, depending upon the type and kind of word involved. In the language of Judge Stephens of this court “differentiation is made between ‘strong’ and weak marks based upon whether the word sought to be protected is general or fanciful.” (*Sunbeam Furniture Corp. v. Sunbeam Corp.* (9 Cir., 1951), 91 F. 2d 141, 144.) The fanciful word is more broadly protected as a trademark or tradename.

The foregoing rule is amplified in *Time, Inc. v. T. I. M. E., Inc.*, 123 Fed. Supp. 446, the court states:

“As Judge Learned Hand observed in *Landers, Frary & Clark v. Universal Cooler Corp.*, 2 Cir., 1936, 85 F. 2d 46; ‘It is quite true that, just as a coined word is easier to protect than a word of common speech upon goods on which the owner has used it, so it is easier to prevent its use upon other kinds of goods. The proprietary connotation,—“secondary meaning,”—of a word of common speech is harder to create and easier to lose, and its fringe or penumbra does not usually extend so far as that of a coined word.’ 85 F. 2d at page 48; see *American Steel Foundries v. Robertson*, *supra*, 269 U. S. at page 372, 46 S. Ct. 160, 70 L. Ed. 317.”

A logical counter part of this doctrine must be that a symbol or design which is to receive “strong” protection, indeed, to be protected at all, must be of a nature and type that is unique or in some way inventive. A white

line can hardly qualify anymore than a picture of a fish or a strand of colored material woven into a wire rope.

So. Calif. Fish Co. v. White Star Canning Co., supra;

A. Leshen and Sons Rope Co. v. Macomber and Whyte Rope Co. (C. C. A.), 142 Fed. 289.

The reason for the foregoing rule of law is clear; no one should be able to usurp or monopolize those things which are common and free for the use of everyone, including a stright white line.

It is our contention that the foregoing principles establish therefore the following rules or guides for the determination of whether or not a particular symbol or design is sufficient to permit the monopolization of a color as a part of that symbol or design:

1. The use of the color must be distinctive and unique;
2. A color may not be usurped or monopolized by merely the use of a title or trade name which contains the name of that color;
3. A court must find of necessity that a particular color such as the white line in our case has not become accepted and common to the product and to the industry;
4. The court should consider as a factor whether or not the particular symbol claimed is entitled to clear and strong protection because it is unique and inventive or whether it is a mark that is common and should be enjoyed by anyone desiring to use it.

The facts in the instant case when tested in the light of the foregoing rules impel the conclusion that the alleged mark of plaintiff cannot qualify for trademark protection.

III.

This Court Has Failed to Follow Its Own Well-established Rules Concerning the Significance and Effect Which Should Be Attached to the District Court's Decision in Favor of Pachmayr.

This Court has laid heavy emphasis on the remarks of Judge Harrison in the course of the trial (Op. p. 8). Actually the crux of Judge Harrison's remarks was that "anybody who was looking *for a white line* as a distinguishing mark would not be able to tell them apart." This is the equivalent of saying that color alone may be a sufficient distinguishing mark, and as numerous cases show this is not the law. In his remarks Judge Harrison was overlooking, as this Court has overlooked, the numerous points of distinction between the two pads, such as the fact that one was named "White Line" and the other was invariably marked "Pachmayr." The innumerable differences in the packaging are also overlooked, although the evidence shows that the two gun recoil pads are invariably sold and displayed in their distinctive packages.

The essential point which is overlooked by this Court is that a trial court speaks through its findings of fact and conclusions of law, not through incidental remarks made prior to the conclusion of the testimony, and prior to argument on significant points of law. If the findings of fact and conclusions of law in the federal case are considered at all, it can scarcely be said that Judge Harrison never deviated from the viewpoint claimed to have been expressed at page 194 of the record. Thus, Judge Harrison found, among other things, as follows:

(1) That such recoil pads so manufactured by defendant are similar in shape and dimension to those manu-

factured by plaintiff, but that such similarity was and is occasioned and did not extend beyond the similarity necessitated by the nature of the product. [R. p. 59.]

(2) That it is not true that a gun recoil pad consisting of a white line, or a layer of material interposed between differently colored lines, or layers of material, has come to signify to the public, and particularly to those who own or deal in guns and gun supplies, the products of plaintiff and no one else. [R. p. 60.]

(3) That the recoil pads manufactured, exploited and sold by defendant contained thereon the words "Pachmayr" and on their face were readily distinguishable from the product sold by plaintiff. [R. p. 60.]

(4) That the packages in which the product of the defendant have been and now are sold are readily distinguishable as to form, design, color and content, from the packages in which the product of plaintiff is sold, and do not confuse or deceive, or have any tendency to confuse or deceive the public, or to give the product of the defendant a saleability which it otherwise would not have. [R. p. 60.]

(5) That it is not true that defendant's acts since 1946 have caused or are causing or are likely to cause purchasers of defendant's said goods to believe them to originate with, or to be vouched for, or sponsored by, plaintiff. [R. pp. 7, 58.]

(6) That it is not true that defendant's acts since 1946 have caused, are causing, or are likely to cause dilution of the value of plaintiff's said symbol trademark, loss of business and loss of profits to plaintiff, and damage to injury to plaintiff's reputation and good will. [R. pp. 7-8, 58.]

In the footnote to its opinion (p. 8), this Court refers to a statement by a witness under some pressure from the trial court to the effect that “I guess you are right” in stating that one would have to look at the name of the manufacturer in order readily to distinguish the difference between the two recoil pads. Innumerable cases cited in appellee’s brief have shown that the use by a manufacturer of his own name does, as one case puts it, “supply the antidote with the bane.” The effect of this Court’s decision is to say that if a subsequent manufacturer uses in a line of material in a product, a color similar or identical to that used by the first manufacturer, the second manufacturer is *ipso facto* guilty of unfair competition and trademark infringement, no matter what he does otherwise by the plain use of his name, dissimilar packaging, and by other distinguishing marks. We submit that this is not the law and is directly contrary to the numerous cases in this and other circuits, cited in appellee’s brief. Furthermore, it is contrary to the principle of appellate decision stated at the beginning of this section, namely, that the court will view the evidence most favorably to the prevailing party. Here, this Court’s decision is written as though appellant herein had been the prevailing party. This Court has not only not given weight to the trial court’s findings, but has looked for evidence which would have supported a contrary finding, even though that evidence conflicts with other evidence favorable to appellee. The burden was on appellant in this case to show wherein the findings favorable to appellee were not supported by sufficient evidence. Neither appellant, nor this Court, has made any successful effort to show that there was not evidence amply sufficient to sustain

the findings of the trial judge. (See *Wingate v. Bercut* (C. C. A. 9), 146 F. 2d 725, 728; Appellee's Br. p. 47.)

In a number of other respects this Court has misinterpreted the record made in the lower court. For example, this Court states that Pachmayr and Mershon owned a *United States Registered* trademark before they parted in 1936. (Op. p. 2.) This statement entirely overlooks Plaintiff's Exhibit 5 [R. p. 233] which shows that Mershon Company, Inc., claimed to have used the trademark commencing in February 1937; that application for the trademark was made on October 12, 1946, and that the trademark was registered on April 27, 1948, for the first time.

By inference this Court has said that the California District Court of Appeal decided only the question of the validity and effect of the Mershon-Pachmayr "not to sue, not to continue use of the mark" agreement. This Court states that the District Court of Appeal "specifically refrained from passing on any other issue, deeming all others immaterial in the circumstances." (Op. p. 3.) The clear fact is that the California District Court of Appeal simply found that the one ground which it chose to discuss was sufficient to justify a general affirmance of the lower court's judgment. As has been shown, the general affirmance of the judgment of the trial court affirms the judgment in all particulars and establishes the trial court's judgment as the only effective judgment upon *all* issues which were raised by the pleadings in the lower court.

City of Vernon v. City of Los Angeles, supra;

Bank of America v. McLaughlin, 40 Cal. App. 2d 620, 628-629, 125 P. 2d 607.

See cases cited in appellee's brief, pages 9-10.

The only state decision, an unfair competition, mentioned by this Court is *Southern California Fish Co. v. White Star Canning Co.*, *supra*. This Court has quoted a single sentence which, under all of the circumstances, was mere dictum. An examination of the decision and particularly the portions quoted on pages 29, 34, and 38 of appellee's brief will show that the decision is entirely favorable to appellee herein, and that the decision of this Court on the matter of unfair competition is directly contrary to the established state law.

This Court, in footnote 3, page 8, of its opinion, has adopted as an important element in its decision the principle that the innocent manufacturer is nonetheless responsible in an unfair competition action for the acts of the dishonest retainer. The Court has relied upon secondary authority (Nims, *Unfair Competition and Trade-marks*, p. 1214, Sec. 381), which cites no California authorities. The textwriter's statement is contrary to the California law.

Southern California Fish Co. v. White Star Canning Co., 45 Cal. App. 426, 434-435;

American Automobile Association v. American Automobile Owners' Association, 216 Cal. 125, 137.

We assume that this Court did not intend to overrule its earlier decisions that matters of unfair competition are governed by local law rather than textwriters' statements.

Sunbeam Furniture Corp. v. Sunbeam Corp. (C. C. A. 9), 119 F. 2d 141, 145.

Conclusion.

Under the rules of law herein set forth we submit that the decision of this Court rendered herein on March 14, 1955, is erroneous in that it disregards the established doctrine of *res judicata*, and contravenes the existing law concerning the establishment and infringement of trademarks.

We therefore respectfully request that the Court grant this petition for rehearing, to the end that there be not incorporated in the law of this Circuit a decision which we respectfully urge is contrary to, and not supported by, established principles of law.

Respectfully submitted,

EDWARD HERVEY,

DONALD W. HAMBLIN,

Attorneys for Appellee.

Certificate of Counsel.

I, Donald W. Hamblin, of counsel for appellee herein, do hereby certify that in my judgment the Petition for Rehearing is well founded and that it is not interposed for delay.

Dated: This 12th day of April, 1955.

DONALD W. HAMBLIN.

No. 13339.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT NORBERT GALVAN,

Appellant,

vs.

U. L. PRESS, Officer in Charge, Immigration and Natural-
ization Service, United States Department of Justice,
San Diego, California,

Appellee.

BRIEF FOR APPELLEE.

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No. 13339.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT NORBERT GALVAN,

Appellant,

vs.

U. L. PRESS, Officer in Charge, Immigration and Naturalization Service, United States Department of Justice, San Diego, California,

Appellee.

BRIEF FOR APPELLEE.

Jurisdiction.

The District Court had jurisdiction of the action under Title 28, U. S. C. A., Section 2241, the appellant having filed a petition for a writ of habeas corpus in the United States District Court, in and for the Southern District of California, Southern Division, after hearings before the Immigration and Naturalization Service resulted in a warrant of deportation being issued against him.

The writ was denied and appellant was remanded to custody. This Court has jurisdiction of the appeal under the provisions of Title 28, U. S. C. A., Section 2253, there being no dispute as to the finality of the order denying the writ of habeas corpus.

Statutes Involved.

Sections 137, 137-3 and 155 of Title 8, U. S. C. A., provide, in pertinent parts, as follows:

“§137. Same; subversive aliens

Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

* * *

(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

* * *

(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;

* * *”

“§137-3. Deportation of subversive aliens

(a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in * * * section 137(2) of this title, shall, upon the warrant of the Attorney General, be taken into

custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in sections 137 to 137-8 of this title, irrespective of the time of their entry into the United States.

* * *

“§155. Deportation of undesirable aliens generally
* * * In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final.

* * *

Statement of Facts.

Appellant is a native and national of Mexico, born in that country on June 6, 1911 [C. T. 174]. He first came to the United States on March 13, 1918, entering this country at El Paso, Texas, and he alleges continuous residence in this country since that time [C. T. 174, 175].

A warrant for the arrest of the plaintiff in deportation proceedings was issued on August 13, 1948, by authority of the Attorney General. The warrant of arrest recited in substance that evidence submitted indicated the alien was subject to deportation under 8 U. S. C. 137, as a member of a group working for the overthrow of the Government of the United States by force and violence. Hearings were conducted on the warrant of arrest on March 10, 1949 [C. T. 68] and on January 12, 1950 [C. T. 77], respectively, to give the alien an opportunity to show cause why he should not be deported.

These hearings were vitiated by the decision of the Supreme Court in the case of *Sung v. McGrath*, 339 U. S. 33, which held that the Administrative Procedure Act was applicable to deportation proceedings. Thereafter, Congress, on September 27, 1950, exempted deportation proceedings from the applicable provisions of the Administrative Procedure Act by the enactment of Public Law No. 843, 81st Congress, Second Session (8 U. S. C. A. 155a), which states:

“Proceedings under law relating to the exclusion or expulsion of aliens shall hereafter be without regard to the provisions of Sections 5, 7 and 8 of the Administrative Procedure Act (5 USC 1004, 1006, 1007).”

On December 12, 1950, the alien was given a *de novo* hearing on the aforesaid warrant of arrest [C. T. 33]. The record of hearing included evidence of admissions by the alien, on March 17, 1948, and on March 31, 1948, that he was a member of the Communist Party of the United States from about 1944 to 1946, that he had attended about ten or twenty meetings of that organization, and that his last attendance at a meeting had been about January, 1947 [C. T. 178, 179, 185, 186, 188].

This hearing on December 12, 1950, resulted in a warrant of deportation issued on October 30, 1951, by authority of the Attorney General, directing that the alien be deported to Mexico on the ground that he had been, after entry, a member of the Communist Party of the United States, and therefore deportable under 8 U. S. C. 137,

as amended by the Internal Security Act of 1950 [C. T. 33-67]. The alien was taken into custody on December 17, 1951, for execution of the warrant of deportation and the writ proceedings followed.

Points Raised by Appellant.

1. Appellant raises for the first time on appeal the constitutionality of the Act of October 16, 1918, as amended by the Internal Security Act of 1950 (8 U. S. C. A. 137, 137(2)(C) and 137-3(a)).

2. Appellant urges, contrary to the finding of the District Court that there was *substantial* evidence to support the warrant of deportation [C. T. 14], that there is insufficient evidence to sustain the warrant of deportation.

3. Appellant contends, contrary to the findings of the District Court that said hearing was fair [C. T. 14], that the appellant was not given a fair and impartial hearing.

4. Appellant contends, contrary to the finding of the District Court that there were no procedural irregularities in said hearing [C. T. 14], that procedure was not followed as required by law and that the administrative hearing was not legally conducted.

ARGUMENT.

I.

Constitutionality.

Appellant, on page 4 of his brief, admits the power of Congress to expel aliens and agrees that the Supreme Court, in *Harisiades v. Shaughnessy*, 342 U. S. 580, has determined that the Act does not contravene the provisions of Article I, Section 9, of the Constitution forbidding *ex post facto* laws. He contends, however, that said Act (Immigration Act of October 16, 1918, as amended by the Internal Security Act of 1950) is invalid under the Due Process clause of the Fifth Amendment, in that this Act made mere membership in the Communist Party of the United States specifically a basis for deportation and eliminated the necessity of proof that the Communist Party of the United States is an organization that believes in, advises, advocates or teaches the overthrow by force or violence of the Government.

Appellee believes that this contention of the appellant can be answered by the statement of Mr. Justice Jackson, on page 593 of *Harisiades v. Shaughnessy*, *supra*, wherein he states:

“During all the years since 1920 Congress has maintained a standing admonition to aliens, on pain of deportation, not to become members of any organization that advocates overthrow of the United States Government by force and violence, a category repeatedly held to include the Communist Party. These aliens violated that prohibition and incurred liability to deportation. They were not caught unawares by a change of law. There can be no contention that they were not adequately forewarned both that their conduct was prohibited and of its consequences.”

While the *Harisiades* case was not concerned with the Immigration Act of October 16, 1918, as amended by the Internal Security Act of 1950, it was concerned with the Act as it existed before the 1950 Amendment. The problem is directly treated in the Opinion of Mr. Justice Reed in the recently decided case of *Carlson v. Landon*, an appeal from the Ninth Circuit, 342 U. S. 524, wherein he states at page 534:

“The basis for the deportation of presently undesirable aliens resident in the United States is not questioned and requires no reexamination. * * * So long, however, as aliens fail to obtain and maintain citizenship by naturalization, they remain subject to the plenary power of Congress to expel them under the sovereign right to determine what non-citizens shall be permitted to remain within our borders.¹⁸

Changes in world politics and in our internal economy bring legislative adjustments affecting the rights of various classes of aliens to admission and deportation.¹⁹ The passage of the Internal Security Act of 1950 marked such a change of attitude toward alien members of the Communist Party of the United States. Theretofore there was a provision for the deportation of alien anarchists and other aliens, who are or were members of organizations devoted to the overthrow by force and violence of the Government of the United States, but the Internal Se-

¹⁸*Nishimura Ekiu v. United States*, 142 U. S. 651, 659; *Fong Yue Ting v. United States*, 149 U. S. 698, 707; *Bugajewitz v. Adams*, 228 U. S. 585; *Ng Fung Ho v. White*, 259 U. S. 276, 280; *United States v. Curtiss-Wright Export Corp.*, 299 U. S. 304, 318; *Eichenlaub v. Shaughnessy*, 338 U. S. 521, 528; III Hackworth's Digest of International Law 725 (1942).

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curity Act made Communist membership alone of aliens a sufficient ground for deportation.²⁰ The reasons for the exercise of power are summarized in Title I of the Internal Security Act. It is sufficient here to print §2(15).²¹ We have no doubt that the doctrines and practices of Communism clearly enough teach the use of force to achieve political control to give constitutional basis, according to any theory of reasonableness or arbitrariness, for Congress to expel known alien Communists under its power to regulate the exclusion, admission and expulsion of aliens.²² Congress had before it evidence of resident aliens' leadership in Communist domestic activities sufficient to furnish reasonable ground for

²⁰See note 4, *supra*. The extension of the proscription of residence to aliens believing in the overthrow of Government by force or violence has been progressive, as can be readily observed by following the successive enactments of laws to regulate the residence of aliens since the Act of February 5, 1917, 39 Stat. 874. See 8 U. S. C. §§137 and 155.

²¹“(15) The Communist movement in the United States is an organization numbering thousands of adherents, rigidly and ruthlessly disciplined. Awaiting and seeking to advance a moment when the United States may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that overthrow of the Government of the United States by force and violence may seem possible of achievement, it seeks converts far and wide by an extensive system of schooling and indoctrination. Such preparations by Communist organizations in other countries have aided in supplanting existing governments. The Communist organization in the United States, pursuing its stated objectives, the recent successes of Communist methods in other countries, and the nature and control of the world Communist movement itself, present a clear and present danger to the security of the United States and to the existence of free American institutions, and make it necessary that Congress, in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each State a republican form of government, enact appropriate legislation recognizing the existence of such world-wide conspiracy and designed to prevent it from accomplishing its purpose in the United States.”

action against alien resident Communists. The bar against the admission of Communists cannot be differentiated as a matter of power from that against anarchists upheld unanimously half a century ago in the exclusion of Turner.²³ Since '[i]t is thoroughly established that Congress has power to order the deportation of aliens whose presence in the country it deems hurtful,'²⁴ the fact that petitioners, and respondent Zydok, were made deportable after entry is immaterial. They are deported for what they are now, not for what they were.²⁵ Otherwise, when an alien once legally became a denizen of this country he could not be deported for any reason of which he had not been forewarned at the time of entry. Mankind is not vouchsafed sufficient foresight to justify requiring a country to permit its continuous occupation in peace or war by legally admitted aliens, even though they never violate the laws in effect at their entry. The protection of citizenship is open to those who qualify for its privileges. The lack of a clause in the Constitution specifically empowering such action has never been held to render Congress impotent to deal as a sovereign with resident aliens.²⁶

Of great interest is the further statement of Mr. Justice Jackson in the *Harisiades* case, *supra*, at page 593, in which he states:

"In 1939, this Court decided *Kessler v. Strecker*, 307 U. S. 22, in which it was held that Congress, in the statute as it then stood, had not clearly expressed an intent that Communist Party membership re-

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mained cause for deportation after it ceased.²⁰ The Court concluded that in the absence of such expression only contemporaneous membership would authorize deportation.

The reaction of the Communist Party was to drop aliens from membership, at least in form, in order to immunize them from the consequences of their party membership.

The reaction of Congress was that the Court had misunderstood its legislation. In the Act here before us it supplied unmistakable language that past violators of its prohibitions continued to be deportable in spite of resignation or expulsion from the party. It regarded the fact that an alien defied our laws to join the Communist Party as an indication that he had developed little comprehension of the principles or practice of representative government or else was unwilling to abide by them."

Thus, whatever the holding of *Bridges v. Wixon*, 326 U. S. 135, and *Schneiderman v. United States*, 326 U. S. 118, as cited by the appellant, "the reaction of Congress was that the Court had misunderstood its legislation."

There can be no misunderstanding that the present legislation and the Supreme Court, in *Carlson v. Landon*, *supra*, wherein it states, at page 535:

"* * * but the Internal Security Act made Communist membership alone of aliens a sufficient ground for deportation"

found no fault with said legislation, and point out the successive enactment of laws to regulate the residence of aliens since the original Act of February 5, 1917.

A possible claim of hardship is treated by the Court at pages 590 and 591 in the case of *Harisiades v. Shaughnessy*, *supra*, wherein the Court states:

“We are urged, because the policy inflicts severe and undoubted hardship on affected individuals, to find a restraint in the Due Process Clause. But the Due Process Clause does not shield the citizen from conscription and the consequent calamity of being separated from family, friends, home and business while he is transported to foreign lands to stem the tide of Communism. If Communist aggression creates such hardships for loyal citizens, it is hard to find justification for holding that the Constitution requires that its hardships must be spared the Communist alien. When citizens raised the Constitution as a shield against expulsion from their homes and places of business, the Court refused to find hardship a cause for judicial intervention.¹⁷

We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government’s power of deportation. However desirable worldwide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. Reform in this field must be entrusted to the branches of the Government in control of our international relations and treaty-making powers.

We hold that the Act is not invalid under the Due Process Clause. * * *

To conclude appellee's argument, directed to appellant's constitutional attack concerning Due Process, a quotation from the Opinion of Circuit Judge Swan, in *United States ex rel. Harisiades v. Shaughnessy*, 187 F. 2d 137, at page 141, simplifies the entire argument.

“* * * A sovereign may exclude aliens altogether or may admit them on such terms as it chooses to impose. While an alien is allowed to remain here he is accorded certain constitutional protections but his license to remain is revocable at the sovereign's will; thereafter with respect to deportation *he is entitled only to 'procedural due process,' that is, that he be given notice of the hearing and opportunity to show that he does not come within the classification of aliens whose deportation Congress has directed.*¹² So far as we can discover none of the later decisions of the Supreme Court casts any doubt upon the continued potency of the earlier cases on this subject.” (Emphasis added.)

¹²The Chinese Exclusion Case, (*Chae Chan Ping v. U. S.*), 130 U. S. 581, 9 S. Ct. 623, 32 L. Ed. 1068; *Fong Yue Ting v. United States*, 149 U. S. 698, 707, 13 S. Ct. 1016, 37 L. Ed. 905; The Japanese Immigration Case (*Kaoru Yamataya v. Fisher*), 189 U. S. 86, 100, 23 S. Ct. 611, 47 L. Ed. 721; *Turner v. Williams*, 194 U. S. 279, 289, 24 S. Ct. 719, 48 L. Ed. 979; *Chuoco Tiaco v. Forbes*, 228 U. S. 549, 556, 33 S. Ct. 585, 57 L. Ed. 960; *U. S. ex rel. Vajtauer v. Comm'r of Immigration*, 273 U. S. 103, 106, 47 S. Ct. 302, 71 L. Ed. 560.

II.

Sufficiency of the Evidence.

Appellant's contention with regard to sufficiency of the evidence is not borne out by the record and it must be remembered that the trial court made a specific finding, not only that there was some evidence which would be sufficient to sustain the administrative procedure, but found that there was "substantial" evidence to support the warrant of deportation [C. T. 14], and repeated the substantiality of the evidence in the conclusions of law [C. T. 50].

While appellant quotes at random from the certified record, when such quotations are considered in the light of the full transcripts of March 17, 1948, beginning on page 173 of the certified record, and of March 31, 1948, beginning on page 183 of the certified record, the ambiguity is dispelled. For example, the following dialog takes place, beginning on page 178 of the certified record:

"Q. Who first induced you to join the Communist Party? A. Morgan Hull.

Q. Is he an organizer for the Communist Party?
A. I think he was. He got me to join about 1944. He did not ask me to join. He just asked me to go to some meetings.

Q. Where did you attend these meetings? A. They are mostly held in different homes.

Q. Prior to the time you were placed under oath, you testified that you first joined the Communist Party about 1944 you believe in the home of Bill Decker. A. I think it was in a bar some place. It wasn't in a home. It was in a little bar at 6th Street near Market. Bill Decker was just in there.

Q. What line of reasoning was given you as to reasons why you should join the Communist Party?

A. I was told that it wasn't a party at that time; that it was a political association.

Q. What reason did they give you for wanting you to join the Party? A. They had no intention of overthrowing the Government or anything; they were just trying to improve the living conditions of the people, of the working class.

Q. Are you presently a member of the Communist Party? A. No, not any more.

Q. When did you leave the Party? A. About two years ago.

Q. Did you resign your membership in writing at that time or was it a verbal resignation? A. No, I just dropped out.

Q. Then you were a member of the Communist Party from approximately 1944 to 1946 when you dropped out. Is that correct? A. Yes.

Q. How many meetings did you attend during the time that you were a member? A. I did not attend very many meetings, about ten or twenty. They were held at 5th and F Streets. It was an office."

Then, on page 182:

"Q. Is there anything further that you care to say at this time? A. I realize that I made a mistake in joining the Communist Party. I don't want to be deported from the United States because of my wife and children. I can easy rejoin the Party and if it is possible in any way I would like the Government to show me leniency and take no action against me but allow me to rejoin the Party, if necessary, and to give information concerning the Party to the United States Government. I am a

member of the CIO Council also and I can furnish information on that.”

Further testimony was given on March 31, 1948, and that testimony which appears on page 184 is of importance.

“Q. I desire to take additional information from you at this time concerning your knowledge of Communist literature which may have been distributed by the Communist Party during the time you were a member of that Party. Are you willing to give information in this regard? A. Yes, sir.

Q. During the period of your membership, did you have occasion to frequent any book stores which contained Communist literature? A. There was an International book store but I don't know the name of it at 6th and E run by two old ladies. I used to go there and read literature concerning labor. They also had many other pamphlets and magazines of the type you describe. I never read these but I saw them there. At that time I was Secretary-Treasurer of Local 64 and I was given literature to distribute or get rid of in any way I could—stuff they had laying around.”

At page 185:

“Q. At the Communist meetings which you attended, is it not true that as a part of their meetings they promoted the sale and distribution of Communist literature? A. That's right.

Q. When you first attended these meetings who promoted this sale and distribution of literature at that time? A. There was a fellow by the name of Morgan Hull.

Q. Was this the same man that you have previously identified in your statement of March 17, 1948? A. That's right.

Q. Did Morgan Hull ever ask you to assist in the sale or distribution of this literature? A. I don't think so. He might have but I don't remember. You mean he would tell you to go and sell the stuff?

Q. Or ask you to buy it, give it away, or anything. A. He used to lecture on this stuff and put the books out for distribution and sale.

Q. Then he would inform the members of the Party at the meeting as to the contents of the pamphlets? A. That's right."

At the conclusion of this testimony, the appellant again offered to give information concerning the Communist Party to the Government if they wanted him to do so.

At this point, it would be wise to call the Court's attention to the regulations then in effect covering arrest and deportation of aliens, and the Court is referred to Title 8, Code of Federal Regulations, Section 150.1, which states in part as follows:

"§150.1. *Investigations*—(a) *Aliens reported, or believed, to be subject to deportation.* The case of every alien reported, or believed, to be subject to arrest and deportation, shall be thoroughly investigated by such officer as may be designated for that purpose.

(b) *Purpose.* The purpose of the investigation shall be to discover whether or not a *prima facie* case for deportation exists; that is, whether there is credible evidence reasonably establishing (1) that the person investigated is an alien, and (2) that he is subject to deportation.

(c) *Interrogation of aliens under investigation.* All statements secured from the alien or any other person during the investigation, which are to be used as evidence, shall be taken down in writing; and the

investigating officer shall ask the person interrogated to sign the statement. Whenever such a recorded statement is to be obtained from any person, the investigating officer shall identify himself to such person and the interrogation of that person shall be under oath or affirmation. Whenever a recorded statement is to be obtained from a person under investigation, he shall be warned that any statement made by him may be used as evidence in any subsequent proceeding. * * *

The Court will note the compliance with the law by the examining officer at the beginning of the taking of each statement of March 17, 1948, on page 173 of the certified record, and of March 31, 1948, on page 183 of the certified record, wherein the examining officer states to the alien:

“Q. You are informed that I am a United States Immigrant Inspector and I now present to you my credentials (displays Form G-440 bearing photograph of examining officer). I am authorized by law to administer oaths and accept testimony in connection with the immigration and naturalization laws. I desire to take a statement from you at this time concerning your right to be and remain in the United States. Any statement you make should be voluntary, and you are hereby warned that anything you say might later be used against you or any other person in any proceedings which the Government may see fit to institute. You are further warned that any false statement knowingly made under oath constitutes the crime of perjury, the penalty for which is a fine of not more than \$2,000 or imprisonment for not more than five years, or by both such fine and imprisonment. Do you understand?”

The statement on page 183 varies but little.

The above interrogation of an alien under investigation gave rise, then, to the issuance of a warrant of arrest, as provided for in 8 C. F. R. 150.3.

Reference to the hearings upon the warrant of arrest begun March 10, 1949, beginning at page 68 of the certified record, and continued to January 12, 1950, beginning at page 77 of the certified record, at which times the appellant was represented by counsel, are indicative of the temperament and state of mind of the alien.

Additional evidence, evidence that has not been refuted, was developed by the production of a witness in the hearing of January 12, 1950, at which time the appellant was represented by counsel, and for the most part refused to answer on constitutional grounds. The testimony is that of Government witness Jona Cooley Meza, and begins on page 110 of the certified record. Mrs. Meza places the appellant at closed meetings which were open only to Communists [C. T. 114, 115] and testifies further that the appellant held an office in the Spanish Speaking Club Unit of the Communist Party of the United States [C. T. 118], that the appellant was elected to the office of educational director at this time [C. T. 119]. The witness further testified to conversations with the appellant, wherein he told her when he joined the Communist Party and why he had joined it [C. T. 126].

It must be then concluded, as found by the District Court, that there was substantial evidence of appellant's membership in the Communist Party.

III.

Fairness of the Hearing.

The hearing of December 12, 1950, was a *de novo* hearing, the ruling of the Supreme Court in *Sung v. McGrath*, 339 U. S. 33, having vitiated the earlier hearings, and the action of Congress on September 27, 1950, exempting deportation proceedings from the applicable provisions of the Administrative Procedure Act, rendered further hearings necessary, in line with the then state of the law. On December 12, 1950, the appellant was again represented by counsel. Passage of the Internal Security Act above referred to had also intervened, and entirely in accord with the procedures outlined the more specific charge of membership in the Communist Party was lodged by the hearing officer.

Counsel for the appellant stipulated that the testimony which had previously been given in the case, together with the exhibits, might be entered of record and made a part of the present hearing and used in arriving at a decision in the case [C. T. 34]. This stipulation covered, among other things, the sworn statement made by appellant on March 17, 1948, and the supplemental sworn statement made by appellant on March 31, 1948 [C. T. 35].

There has been no unfairness in the long and studied hearings given to the appellant. He was represented by counsel at all times and counsel for appellant raises only speculation to base his allegation that they were not legally conducted according to law, contrary to the finding of the District Court.

Nowhere does appellant specifically point to unfairness in the hearing.

Any suggestion by the appellant that the deportation proceedings must be tested by principles of law applicable to criminal proceedings is without foundation. It is well settled that deportation, while it may be burdensome and severe for the alien, is not a punishment.

Mahler v. Eby, 264 U. S. 32.

See also:

Zakonaite v. Wolf, 226 U. S. 272, and
Lapina v. Williams, 232 U. S. 78.

IV.

Scope of Inquiry.

The inquiry of the Court upon writ proceedings in deportation cases is limited, as established by a long line of decisions. If the hearing in deportation proceedings is fair, if there is evidence to support the finding of the Attorney General, and if no error of law is committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings.

Kessler v. Stracker, 307 U. S. 22;
Bridges v. Wixon (9 Cir., 1944), 144 F. 2d 927;
Moncado v. Ramsey (8 Cir., 1948), 167 F. 2d 191;
Von Kleczkowski v. Watkins, 71 Fed. Supp. 429
(D. C. N. Y., 1947).

A particularly cogent statement of the scope of the inquiry of the Court in habeas corpus proceedings is set out in the Opinion of Mr. Justice Douglas, of the United States Supreme Court, in the case of *Eagles v. Samuels*, 329 U. S. 304 (1946), beginning at the bottom of page 311, in which the Court states:

“It is elementary that *habeas corpus* may not be used as a writ of error. *Tisi v. Tod*, 264 U. S. 131;

Woolsey v. Best, 299 U. S. 1. The function of *habeas corpus* is exhausted when it is ascertained that the agency under whose order the petitioner is being held had jurisdiction to act. If the writ is to issue, mere error in the proceeding which resulted in the detention is not sufficient. *Tisi v. Tod*, *supra*. Deprivation of petitioner of basic and fundamental procedural safeguards, an assertion of power to act beyond the authority granted the agency, and action without evidence to support its order, are familiar examples of the showing which is necessary. See *Johnson v. Zerbst*, 304 U. S. 458; *Bridges v. Wixon*, 326 U. S. 135, 149. But it is not enough to show that the decision was wrong, *Tisi v. Tod*, *supra*, or that incompetent evidence was admitted and considered. *Vajtauer v. Commissioner*, 273 U. S. 103. If it cannot be said that there were procedural irregularities of such a nature or magnitude as to render the hearing unfair, *Bridges v. Wixon*, *supra*, p. 156, or that there was no evidence to support the order, *Vajtauer v. Commissioner*, *supra*, the inquiry is at an end.”

The Court further states, at page 315:

“* * * But as we have said, the range of inquiry in a *habeas corpus* proceeding is limited. We are not sitting in review of action of federal agencies over which we have the power of supervision. Cf. *McNabb v. United States*, 318 U. S. 332. The function of *habeas corpus* is not to correct a practice but only to ascertain whether the procedure complained of has resulted in an unlawful detention. It is the impact of the procedure on the person seeking the writ that is crucial. Whatever potentialities of abuse a particular procedure may have, the case is at an end if the challenged proceeding cannot be said to have been

so corrupted as to have made it unfair. Samuels points to possibilities of abuse. But he fails to establish prejudice in his case.”

The *Eagles* case also makes clear the fact that the burden of proof in a habeas corpus proceeding is upon the petitioner and he must go forward to support the allegations of his petition.

The District Court found specifically on the points enumerated above within the scope of the inquiry [C. T. 14], and concluded as a matter of law that the Immigration and Naturalization Service that conducted the hearing of December 12, 1950, had jurisdiction to act, that the hearing was fair, that none of the constitutional rights of the appellant was abridged or violated, and that there was substantial evidence to support the order of deportation [C. T. 15].

Conclusion.

In conclusion, it might be wise to repeat the language of *Harisiades v. Shaughnessy*, *supra*, at page 591:

“We think that, in the present state of the world, it would be rash and irresponsible to reinterpret our fundamental law to deny or qualify the Government’s power of deportation. However desirable worldwide amelioration of the lot of aliens, we think it is peculiarly a subject for international diplomacy. It should not be initiated by judicial decision which can only deprive our own Government of a power of defense and reprisal without obtaining for American citizens abroad any reciprocal privileges or immunities. * * *

Appellee, therefore, requests that the judgment of the District Court be affirmed.

Respectfully submitted,

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United States
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COM-
MISSION OF OREGON, THE OREGON
STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COM-
PANY,

Intervenor.

*Petition for Review to Set Aside Order of the
Federal Power Commission.*

PETITIONERS' BRIEF

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The Federal Power Commission found that the Deschutes River is a nonnavigable stream; that the proposed project would not affect inter-state or foreign commerce; that the operation of

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the proposed project in conjunction with the re-regulating dam would prevent the project from adversely affecting interests downstream since substantially all the natural river flow will be released through the dam at all times; that the proposed project will occupy lands of the United States; that under Section 10(a) of the Federal Power Act, the proposed project is in the public interest and will provide for comprehensive development of the Deschutes River and will be consistent with further comprehensive development of that stream and of the Columbia (River) Basin (R. 418, 423, 425).

Errors, Assignment of 12-15

“The proposed project, if constructed, would occupy lands and a reservation of the United States. Therefore, construction of the project without a license from this Commission would be unlawful.” (R. 332, 433.)

“ * * * that there is no State law which would by its own terms prohibit construction of the project, although the two State Commissions have so far refused to issue the permits or licenses.” (R. 341.)

“ * * * it is clear that the State laws involved cannot stand as a complete legal bar to Federal authorization of a project lacking a State permit if, in the judgment of the Commission, that project is best adapted to comprehensive plans and would be of unmistakable public benefit.” (R. 433.)

“All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project or any part thereof, whether located on

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or off the project area, if and to the extent that the inclusion of such property is a part of the project is approved or acquiesced in by the Commission; *also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.*" (R. 375, 433.)

"The refusal of the Oregon Fish Commission, acting under an existing law of the State of Oregon, to issue a permit for the Pelton project, is not a bar to the issuance of a Federal Power Act license and to the construction and operation of the proposed project under such license, if that project is found to meet the standards specified for comprehensive waterpower development in the Federal Power Act." (R. 375, 433.)

"Any rights to the use of waters in the Deschutes River and its tributaries in connection with the Licensee's project under this license shall be subordinate to (R. 433):

"(i) All existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries for domestic, stock, municipal and irrigation purposes, including the right to store any such waters in the proposed Benham Falls, Post and Prineville reservoirs and in the existing Crane Prairie, Crescent Lake, and Wickiup reservoirs; and (R. 443)

"(ii) The use of additional flows of the Deschutes River and its tributaries pursuant to rights which may be initiated hereafter for the diversion and storage of waters for domestic, municipal, stock and irrigation purposes in connection with any reclamation projects undertaken pursuant to the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto),

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the amounts of water to be used under the additional rights, together with the uses under existing rights whatever they may be, not, by reason of the additional right, to exceed these quantities:

“(a) Deschutes River and its tributaries above Cline Falls—entire flow (R. 443, 444);

“(b) Squaw Creek—all flows during the non-irrigation season (R. 444);

“(c) Lake Creek—20,000 acre-feet annually (R. 444);

“(d) Crooked River and its tributaries—all the flows above the Highway Bridge at the place where U. S. Highway 97 crosses the Crooked River Canyon (R. 444);

“(e) Crook River below the Highway Bridge—not to exceed 2,500 acre-feet annually for the proposed Deschutes project domestic water system; and (R. 444)

“(f) An additional 400 second-feet that may be taken above the Licensee’s project either from the Deschutes River below Cline Falls or the Crooked River below the Highway Bridge during the irrigation season.” (R. 444.)

The Petitioners in the Petition for Review (R. 512-515), set forth fifteen findings of fact made by the Federal Power Commission in its Opinions and Order, issuing a license herein, which findings Petitioners contended were not supported by substantial evidence.

In order to avoid duplication, and also to relieve the Court of the burden and the necessity of perusing cumulative and repetitious argument concerning this phase of the case, the Isaak Walton League of America, Oregon Division *amicus curiae*, will, in its Brief to be filed herein, argue these points.

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1. The Federal Power Commission does not have jurisdiction, power, or authority to authorize and to license the construction, operation, and maintenance of the proposed project.

2. The Deschutes River and its tributaries are internal and non-navigable streams of the State of Oregon.

3. The proposed project will not affect interstate or foreign commerce.

4. The operation of the proposed project in conjunction with the re-regulating dam will prevent the project from adversely affecting interests downstream, and will not affect the navigable flow or the navigable capacity of the Columbia River.

5. There is no provision in the Federal Constitution delegating to the central government power to control the acquisition and use of non-navigable streams.

6. Under the Acts of Congress of 1866, 1870 and 1877 (Desert Land Acts, 43 U.S.C.A. 321), the Federal Government irrevocably and unconditionally surrendered, or relinquished to the States, including the State of Oregon, whatever rights the government may have had to control the use of the waters of non-navigable streams.

7. Under the Territory Act of Oregon of August 14, 1848, it was provided that rivers and streams of water in the Territory of Oregon in which salmon are found, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

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8. Under the Constitution and laws of the State of Oregon, no person may construct a dam in any of the streams of this State to a height that will make a fish ladder or fishway there-over impracticable, without first having obtained from the Fish Commission of Oregon a permit to construct such a dam.

9. Under the provisions of Section 116-401, O.C.L.A., all waters within the State of Oregon, from all sources of water supply, belong to the public.

10. The common law doctrine of riparian rights has been abrogated in Oregon by statute.

11. Under the Constitution of Oregon, 1859, the rights, title, and interest in and to all water from the development of water power, and to water power sites which the State of Oregon owns or hereafter acquires, shall be held in perpetuity.

12. Under the provisions of the Oregon Water Code, the waters of the State of Oregon may not be appropriated without its consent.

13. No right to appropriate or to use the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including water over which the State has concurrent jurisdiction in connection with the development of any water power project for the generation of electricity, shall be initiated, perfected, acquired or held, without the consent of the State of Oregon.

14. The Federal Power Commission may not act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of a non-navigable stream in the State of Oregon.

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16. The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with Section 9(b) of the Federal Power Act by showing compliance with the laws of the State of Oregon.

17. The Fish Commission of the State of Oregon has denied a permit to the Portland General Electric Company to construct the Pelton Dam.

18. The Hydroelectric Commission of Oregon has denied the Portland General Electric Company's application, and supplemental applications, for a preliminary permit to construct the hydroelectric project in question.

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United States
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COM-
MISSION OF OREGON, THE OREGON
STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COM-
PANY,

Intervenor.

*Petition for Review to Set Aside Order of the
Federal Power Commission.*

PETITIONERS' BRIEF

MAY IT PLEASE THE COURT:

I.

STATEMENT OF THE CASE

This Brief is filed in support of the Petition for Re-
view to set aside an order of the Federal Power Com-
mission, granting license (major) to the Portland Gen-

eral Electric Company, Intervenor, to construct, operate and maintain a hydroelectric project on the Deschutes River, an interior, non-navigable river of the State of Oregon, and the right to use, divert and impound the waters in the Deschutes River and its tributaries, all interior, non-navigable rivers of the State of Oregon.

The State of Oregon, in its sovereign capacity, the Fish Commission of Oregon, and the Oregon State Game Commission, the last both being administrative agencies and commissions of the State of Oregon, charged with the administration of the commercial fishing and fisheries laws, and the management, protection, preservation, propagation and promotion of game fish, respectively, in said State, are the Petitioners herein.

The Intervenor, the Portland General Electric Company, is an electric public utility corporation, organized under the laws of the State of Oregon, with its principal office in the City of Portland, Oregon. It is engaged as such public utility in the business of generating, transmitting and selling electric energy in said State of Oregon.

Petition for Review was filed herein in compliance with Rule 43 of this Court, and with Section 313(b) of the Federal Power Act, (49 Stat. 860, T. 16 U.S.C.A., Sec. 825(b)).

The State of Oregon, the Fish Commission of Oregon, the Oregon State Game Commission and the Sellwood Chapter (Portland, Oregon), Izaak Walton League of America, Inc., intervened in this proceeding before the Federal Power Commission and opposed and ob-

jected to the issuance of a license to the Portland General Electric Company authorizing it to construct, operate and maintain the proposed hydroelectric project on the Deschutes River in Oregon (R. 242, 243).

The Tribal Council for the Warm Springs Indian Reservation of Oregon was a party to this proceeding before the Federal Power Commission. It offered no objection to the issuance of a license for the proposed project (R. 354).

An application for a license under the Federal Power Act was filed on May 23, 1949 (R. 117-170), by the Northwest Power Supply Company of Portland, Oregon, a corporation originally formed in 1949 under the sponsorship of three operating utility companies in the region for the principal purpose of obtaining a license for development of a hydroelectric site on the Deschutes River in Oregon, known as the Pelton Site. Subsequently, two of the sponsoring companies became interested in other power developments, leaving Portland General Electric Company of Portland, Oregon, as the only sponsoring company directly interested in the proposed development. A supplement to the application filed in June, 1951, states that the Portland General Electric Company has become the applicant for a license (R. 244). A public hearing on the application was held in Portland, Oregon, commencing on June 11, 1951 (R. 237). Petitions for permission to intervene in this matter as formal parties were filed by the Attorney General of the State of Oregon, the Oregon Fish Commission, the Oregon State Game Commission and the

Oregon Division of the Izaak Walton League of America, Inc. (R. 305, 309). These petitions were granted (R. 242, 43). During the course of the public hearing, oral and documentary evidence was presented in opposition to and in favor of the proposed project.

The proposed project would consist of a concrete arch dam approximately 205 feet high (R. 325), a reservoir with a normal pool at elevation 1,580 feet (R. 325), (which will be drawn down six feet in normal operation), three short penstocks, a side channel and tunnel spillway, an outdoor type powerhouse located near the dam containing three 52,000 (R. 325) horsepower turbines operating under a gross head of about 152 feet connected to three 36,000 kilowatt generators (a total capacity of 108,000 kilowatts), and related facilities, including a switching station and a 230 kv transmission line (R. 325). In addition to these power facilities, the project would include a second, but smaller, re-regulating dam located about three miles downstream from from the power dam. Behind this smaller dam, which would perform no power functions, but would serve to iron out the fluctuating flows produced by the power production at the main dam, there would be a small reservoir with normal pool level at elevation 1,422 (R. 325).

Construction of the proposed project would prevent free passage of anadromous fish in the Deschutes River and would result ultimately in their total destruction (R. 699-703) (R. 436). These fish are dependent on spawning grounds for survival, all of which are above

the Pelton Site, 154 miles of which are known, by actual survey, to contain various grades of spawning gravel. Fish ladders over a dam of this height are impractical, for the reason that it is impossible for anadromous fish to use ladders of such height (R. 699). For this reason Portland General Electric Company, in addition to the works generally outlined above, proposed to install certain facilities at the project for the purpose of holding anadromous fish below the dam relieving them of their eggs so that the eggs could be transported by truck to a hatchery for artificial rearing of the fingerling fish which, under natural conditions, would have been produced in the waters above the dam (R. 325, 326).

The Deschutes is an interior, nonnavigable river of the State of Oregon and is a tributary of the Columbia River (R. 330). A setting forth of some general facts relative to the geography, topography and stream flow may be helpful in understanding the issues of this case.

The Deschutes River rises near the summit of the Cascade Range and flows northward along the foot of the eastern slope to join the Columbia River at a point about 15 miles upstream from The Dalles, Oregon. The drainage basin, with an area of about 10,500 square miles, has a shape somewhat like an inverted Y, and Little Deschutes River forms the drainage pattern of the western arm. Twenty miles below its junction with Little Deschutes River, the main stream flows through Bend, the most important city in the basin (R. 327).

About 55 miles north of Bend, two important tributaries, the Metolius and Crooked Rivers join the main

stream, from the west and east, respectively, and at that point the flow from springs greatly augments the run-off which is depleted by irrigation diversions above Bend. Only two other important tributaries, Warm Springs River and White River at mile 84 and mile 47, respectively, enter the stream below Bend. Most of the basin is covered with timber, and this timbered area includes all of Deschutes National Forest, and portions of Mt. Hood and Ochoco National Forests. Topography of the basin is generally broken and rugged, except for the Central Oregon plateau and the comparatively level bench lands in the mid-valley section. Throughout the lower 130 miles, the river flows in a narrow canyon with an average fall of 17.6 feet to the mile. The agricultural lands consist largely of high table lands cut by deep canyons through which the rivers flow and small arable areas which border the streams. The soil is a coarse, disintegrated lava and the rocks of the entire area are volcanic and very porous. The river valley varies in width from 200 to 1,200 feet (R. 328).

The geological formations, being porous in nature, act as underground reservoirs regulating run-off from the basin. The Deschutes River has perhaps the most uniform flow of any river of comparable size in the Columbia River Basin, and has a maximum discharge near Madras, which is in the vicinity of the proposed project, of about 13,300 cubic feet per second, the minimum at the same point being about 2,900 cubic feet per second. The mean annual run-off near Madras is 3,011,800 acre-feet, and the average flow is about 4,200 cfs (R. 328).

Flow in the Deschutes is remarkably uniform, and because of the geological conditions in the basin, large floods are not regarded as probable in any part of the basin except on Crooked River, which enters the Deschutes from the east at mile 113, or about 10 miles above the proposed project. No floods causing major damage are known to have occurred (R. 328).

Metolius and Warm Spring Rivers are the principal salmon supporting tributaries of Deschutes River. These streams support runs of spring chinook salmon and steelhead trout. Falls and dams above the confluence of Metolius River block the upstream passage of anadromous fish. The Oregon Fish Commission has constructed and put into operation a salmon hatchery on Metolius River. The Deschutes River has numerous rainbow, cutthroat, German brown trout, steelhead and salmon and is nationally known for its sport fishing (R. 329).

Seasonal low flows of Deschutes River and its tributaries above Bend are completely appropriated and are used primarily for irrigation of lands lying east of the river (R. 329).

The proposed project would occupy lands of the United States and would affect the Warm Springs Indian Reservation (R. 331) (433).

On January 20, 1949, four months prior to the filing of its application with the Federal Power Commission, the Northwest Power Supply Company filed with the Hydroelectric Commission of Oregon an application for a preliminary permit, Project No. 170, commonly known

as the Pelton Project, for authority to appropriate 7,040 cubic feet per second of water from the Deschutes River for the purpose of developing 120,000 theoretical horsepower under a head of 150 feet and to construct a dam and powerhouse at the Pelton Site (Ex. 8).

This application was filed in compliance with the terms of Title 119, Ch. 1, Sec. 119-101 et seq., Oregon Compiled Laws Annotated, which, in substance, provides that no water-power project involving the right to use or appropriate the waters of any rivers or other bodies of water within the State of Oregon, for the generation of electricity shall be begun or constructed except in conformity with the provisions of said Act, which, among other things, provides for the issuance of a preliminary permit by the Oregon Hydroelectric Commission before any such water-power project shall be initiated.

Section 83-316, Oregon Compiled Laws Annotated (Oregon Laws 1921, Ch. 105, Sec. 49), provides in substance that in the event any person desires to construct a dam in any of the streams of Oregon to a height that will make a fish ladder or fishway therover impracticable in the opinion of the Oregon Fish Commission, then such person may make an application to the Commission for a permit to construct the dam. The Oregon Fish Commission is authorized to grant such permit in its discretion on the condition that the person so applying for such permit shall convey to the State of Oregon a site of the size and dimensions satisfactory to the Fish Commission, at such place as may be selected by said Commission, and shall erect thereon a hatchery residence

in accordance with plans and specifications to be furnished by the Commission. The act further provides that such person shall enter into an agreement with the Commission secured by bond to furnish all water and light without expense, to operate said proposed hatchery. This act further provides that the Fish Commission shall not issue a permit for the construction of an such dam until the person applying for such permit shall have actually conveyed said land to the State and shall have erected said hatchery and hatchery residence thereon in accordance with said plans and specifications.

A public hearing was held on said application by the Hydroelectric Commission. It found that the Deschutes and Metolius Rivers are spawning grounds for anadromous fish; that the proposed dam would be of such height that fish ladders or fishways would be impracticable and that the release of water from said river for peaking purposes would endanger the lives of fishermen and would be injurious to young fish. Based on these findings the Hydroelectric Commission, on July 1, 1949, issued the following order (Ex. 8):

"1. That the Northwest Power Supply Company file with the Hydroelectric Commission of the State of Oregon, made pursuant to Section 83-316, O.C.L.A., for a permit to construct, at its Pelton site on the Deschutes River, a dam of a height which will make a fish ladder or fishway therefore impracticable.

"2. That the applicant file with the Hydroelectric Commission of Oregon, a statement from the Fish Commission of the State of Oregon, or a certified copy there-

of, that said Fish Commission will issue such a permit, pursuant to the provisions of said Section 83-316, showing compliance therewith.

"3. That the applicant be and it hereby is notified that should a preliminary permit be granted by the Hydroelectric Commission, it will be required to submit to the Commission plans for either eliminating or regulating the operational fluctuations of water below the dam to an amount which will not be dangerous to human life or injurious to fish life." (Ex. 8)

Therefore, in obedience to said order, the Northwest Power Supply Company applied to the Oregon Fish Commission for a permit to construct said dam. The applicant stated that it would construct a fish hatchery and convey it to the State in conformity to the above-mentioned statute. After careful consideration of the application and based on information obtained from its own investigation together with information obtained from the Oregon State Game Commission and the United States Fish and Wildlife Service, the Oregon Fish Commission denied the application for the reasons generally that the State would suffer great financial loss in being compelled to abandon its fish hatchery on the Metolius River; that federal funds in the amount of \$220,000 for the future Development of said fish hatchery were then being withheld pending the outcome of said application and that the fish handling facilities proposed by the applicant in lieu of fish ladders were impracticable (Ex. 9).

Subsequently, the Portland General Electric Company, as successor in interest to the Northwest Power Supply Company, filed an application with the Oregon Fish Commission for a reconsideration of its former action denying the application of the Northwest Power Supply Company. It is proposed, as a substitute for the free passage of fish up the river, to construct facilities below the dam for holding adult salmon and steelhead until they were ready to spawn and to pay \$100,000 a year toward the cost of transporting the eggs to the State's hatchery on the Metolius River and for transporting the fingerlings from the hatchery to a point below the dam for release or, in lieu of this, it proposed to acquire a site on the Warm Springs River in the Indian Reservation and to construct a hatchery thereon to be used in lieu of the present hatchery of the State located on the Metolius River. This application was likewise denied by the Oregon Fish Commission for substantially the same reasons that it denied the application of the Northwest Power Supply Company. The reasons for the denial for both these applications will appear more fully in copies of the orders of the Oregon Fish Commission which will be contained in the printed record to be filed later in this case (Ex. 9).

By order dated September 7, 1951, the Hydroelectric Commission of Oregon denied the application of the Northwest Power Supply Company and the Portland General Electric Company for reconsideration of the former order of said Commission heretofore referred to, for the reason that the applicant had failed to comply with the requirements of the order of said Commission

of July 1, 1949. This order is not a matter of record in the transcript of evidence before the Federal Power Commission in this proceeding. However, a certified copy of such order was mailed in the transcript of evidence before the Federal Power Commission in this proceeding. However, a certified copy of such order was mailed to Mr. Leon M. Fuquay, Secretary of the Federal Power Commission, Washington, D.C., and the Portland General Electric Company, Portland, Oregon, by Mr. Charles E. Stricklin, Secretary of the Hydroelectric Commission of Oregon, both on October 17, 1951. A certified copy of this order was placed in the custody of the clerk of this Court for inspection by the Court on the hearing of this petition.

The Federal Power Commission found that the Deschutes River is a nonnavigable stream; that the proposed project would not affect interstate or foreign commerce; that the operation of the proposed project in conjunction with the re-regulating dam would prevent the project from adversely affecting interests downstream since substantially all the natural river flow will be released through the dam at all times; that the proposed project will occupy lands of the United States; that under Section 10(a) of the Federal Power Act, the proposed project is in the public interest and will provide for comprehensive development of the Deschutes River and will be consistent with further comprehensive development of that stream and of the Columbia (River) Basin (R. 418, 423, 425).

The Petitioners contend that the Federal Power Commission erred in holding:

“The proposed project, if constructed, would occupy lands and a reservation of the United States. Therefore, construction of the project without a license from this Commission would be unlawful.” (R. 332, 433).

“ * * * that there is no State law which would by its own terms prohibit construction of the project, although the two State Commissions have so far refused to issue the permits or licenses.” (R. 341).

“ * * * it is clear that the State laws involved cannot stand as a complete legal bar to Federal authorization of a project lacking a State permit if, in the judgment of the Commission, that project is best adapted to comprehensive plans and would be of unmistakable public benefit.” (R. 433).

“All other structures, fixtures, equipment or facilities used or useful in the maintenance and operation of the project and located on the project area, including such portable property as may be used or useful in connection with the project of any part thereof, whether located on or off the project area, if and to the extent that the inclusion of such property is a part of the project is approved or acquiesced in by the Commission; *also all riparian or other rights, the use or possession of which is necessary or appropriate in the maintenance and operation of the project.*” (R. 375, 433).

“The refusal of the Oregon Fish Commission, acting under an existing law of the State of Oregon, to issue a permit for the Pelton project, is not a bar to the issuance of a Federal Power Act license and to the construction and operation of the proposed project under

such license, if that project is found to meet the standards specified for comprehensive waterpower development in the Federal Power Act.” (R. 375, 433).

“Any rights to the use of waters in the Deschutes River and its tributaries in connection with the Licensee’s project under this license shall be subordinate to (R. 433):

“(i) All existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries for domestic, stock, municipal and irrigation purposes, including the right to store any such waters in the proposed Benham Falls, Post and Prineville reservoirs and in the existing Crane Prairie, Crescent Lake, and Wickiup reservoirs; and (R. 443)

“(ii) The use of additional flows of the Deschutes River and its tributaries pursuant to right which may be initiated hereafter for the diversion and storage of waters for domestic, municipal, stock and irrigation purposes in connection with any reclamation projects undertaken pursuant to the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and acts amendatory thereof or supplementary thereto), the amounts of water to be used under the additional rights, together with the uses under existing rights whatever they may be, not, by reason of the additional right, to exceed these quantities:

“(a) Deschutes River and its tributaries above Cline Falls — entire flow; (R. 443, 444)

“(b) Squaw Creek — all flows during the non-irrigation season; (R. 444)

“(c) Lake Creek — 20,000 acre-feet annually; (R. 444)

“(d) Crooked River and its tributaries — all the flows above the Highway Bridge at the place where U.S. Highway 97 crosses the Crooked River Canyon; (R. 444)

“(e) Crooked River below the Highway Bridge — not to exceed 2,500 acre-feet annually for the proposed Deschutes project domestic water system; and (R. 444)

“(f) An additional 400 second-feet that may be taken above the Licensee’s project either from the Deschutes River below Cline Falls or the Crooked River below the Highway Bridge during the irrigation season.” (R. 444).

The petitioners in the Petition for Review (R. 512-515), set forth fifteen findings of fact made by the Federal Power Commission in its Opinions and Order, issuing a license herein, which findings Petitioners contend were not supported by substantial evidence.

In order to avoid duplication, and also to relieve the Court of the burden and the necessity of perusing cumulative and repetitious argument concerning this phase of the case, the Izaak Walton League of America, Oregon Division, *amicus curiae*, will, in its Brief to be filed herein, argue these points.

Points on Which Petitioner Intends to Rely

1. The Federal Power Commission does not have jurisdiction, power, or authority to authorize and to license the construction, operation, and maintenance of the proposed project.

2. The Deschutes River and its tributaries are internal and non-navigable streams of the State of Oregon.

3. The proposed project will not affect interstate or foreign commerce.

4. The operation of the proposed project in conjunction with the re-regulating dam will prevent the project from adversely affecting interests downstream, and will not affect the navigable flow or the navigable capacity of the Columbia River.

5. There is no provision in the Federal Constitution delegating to the central government power to control the acquisition and use of non-navigable streams.

6. Under the Acts of Congress of 1866, 1870 and 1877 (Desert Land Acts 43, U.S.C.A. 321), the Federal Government irrevocably and unconditionally surrendered, or relinquished to the States, including the State of Oregon, whatever rights the government may have had to control the use of the waters of non-navigable streams.

7. Under the Territory Act of Oregon of August 14, 1848, it was provided that rivers and streams of water in the Territory of Oregon in which salmon are found, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

8. Under the Constitution and laws of the State of Oregon, no person may construct a dam in any of the

streams of this State to a height that will make a fish ladder or fishway there-over impracticable, without first having obtained from the Fish Commission of Oregon a permit to construct such a dam.

9. Under the provision of Section 116-401, O.C.L.A., all waters within the State of Oregon, from all sources of water supply, belong to the public.

10. The common law doctrine of riparian rights has been abrogated in Oregon by statute.

11. Under the Constitution of Oregon, 1859, the rights, title, and interest in and to all water for the development of water power, and to water power sites which the State of Oregon owns or hereafter acquires, shall be held in perpetuity.

12. Under the provisions of the Oregon Water Code, the waters of the State of Oregon may not be appropriated without its consent.

13. No right to appropriate or to use the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including water over which the State has concurrent jurisdiction in connection with the development of any water power project for the generation of electricity, shall be initiated, perfected, acquired or held, without the consent of the State of Oregon.

14. The Federal Power Commission may not act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of a non-navigable stream in the State of Oregon.

15. The Federal Power Commission has no authority to allocate the use of the waters of the Deschutes River and its tributaries in connection with the Pelton project under the license granted to the Portland General Electric Company.

16. The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with Section 9(b) of the Federal Power Act by showing compliance with the laws of the State of Oregon.

17. The Fish Commission of the State of Oregon has denied a permit to the Portland General Electric Company to construct the Pelton Dam.

18. The Hydroelectric Commission of Oregon has denied the Portland General Electric Company's application, and supplemental applications, for a preliminary permit to construct the hydroelectric project in question.

II.

BRIEF OF AUTHORITIES

I

The rivers and streams of water in the territory of Oregon in which salmon are found shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

Act of Congress (August 14, 1848, Territory of Oregon Act.) 9 Stat. L. Sec. 12, Ch. 177, p. 328.

II

“All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed.”

Article XVIII, Sec. 7, Constitution of Oregon, 1859.

III

In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover impracticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery

and hatchery residence in accordance with said plans and specifications.

Ch. 105, sec. 49, Oregon Laws 1921; O.C.L.A., Sec. 83-316.

IV

The common-law doctrine of riparian rights has been virtually abrogated in Oregon and for practical purposes appears to be no longer more than a legal fiction.

California Oregon Power Co. vs. Beaver Portland Cement Co., 295 U.S. 142, 164, 79 L. Ed. 1356, Jennison vs. Kirk 98 U.S. 453, 25 L. Ed. 240, Atchison vs. Peterson, 20 Wall. 507, 22 L. Ed. 414.

V

All waters within the state (Oregon) from all sources of water supply belong to the public.

O.C.L.A., sec. 116-401.

VI

The above section 116-403, O.C.L.A., abolish the rule that a riparian owner has the right to have a stream continue to flow substantially undiminished in its natural channel.

California-Oregon Power Co. vs. Beaver Portland Cement Co., 73 Fed. 2nd 555.

The common-law rule as to "continuous flow" of a stream, or riparian doctrine, may be changed by statute except as such change may affect some vested right.

Re: Water Rights of Hood River, 114 Or. 112, 227 P. 1065.

VIII

The Oregon water code has been sustained as constitutional by the Supreme Court of the United States.

California-Oregon Power Co. vs. Beaver Portland Cement Co., 295 U.S. 142, 79 L. Ed. 1356.

IX

The rights, title and interest in and to all water for the development of waterpower and to water power sites, which the state of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Article XI-D, sec. 1, Constitution of Oregon, 1859.

X

The Desert Land Act (Act of Congress, March 3, 1877, amended 43, U.S.C.A. 321) had the effect to sever all waters upon the public domain, not theretofore appropriated, from the land itself.

California-Oregon Power Co. vs. Beaver Portland Cement Co.

Brush vs. Commissioners of Internal Revenue, 300 U.S. 352.

Ickes vs. Fox, 300 U.S. 82, 57 S. Ct. 412.

XI

Under the federal Acts of 1866, 1870 and 1877 (Title 43, Section 661, United States Code annotated (14 Stat. 251, 16 Stat. 217)) the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of waters of non-navigable streams in the West.

Jennison vs. Kirk, 98 U.S. 453, 25 L. Ed. 240,
 California Oregon Power Company vs. Beaver
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 174 U.S. 690, 706, 19 S. Ct. 770,
 Gutierrez vs. Albuquerque Land & Irrigation
 Company, 188 U.S. 545, 553, 23 S. Ct. 338.

XII

The power to legislate on the question of the acquisition and control of water rights has never been delegated to the United States and hence such power properly belongs to the individual states.

Kansas vs. Colorado, 206 U.S. 46, 94,
 Fox vs. Ieckes, 137 Fed. 2nd 30.

XIII

The waters of the state of Oregon may not be appropriated without its consent.

Sec. 116-401 et seq. (Oregon water code
 O.C.L.A.)

XIV

From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with the development

of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the period or periods or extensions thereof as herein stated, and pursuant to the provisions hereof. (Ore. L. 1931, ch. 67, sec. 2, p. 82; O. C. 1935 Supp., sec. 47-2102.)

Sec. 119-102, O.C.L.A.

XV

From and after the taking effect of this act, no water-power project involving the use of the waters of any of the lakes, rivers, streams or other bodies within the state of Oregon, including waters over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof. Ore. L. 1931, ch. 67, sec. 3, p 83; O. C. 1935 Supp., sec. 47-2103.)

Sec. 119-103, O.C.L.A.

XVI

The refusal of the Fish Commission of Oregon and the Oregon Hydro-electric Commission to approve the Pelton Project is an absolute bar to the licensing of the proposed project. Sec. 9(b) Federal Power Act (16 U.S.C.A. 802 b.)

First Iowa Hydro-electric Cooperative vs. Federal Power Commission, 328 U.S. 152.

State of Iowa vs. Federal Power Commission, 399 U.S. 979.

III.

ARGUMENT

INTRODUCTION:

The Federal Power Commission, as we herefore have pointed out, found that the Deschutes River is a non-navigable stream; that the proposed project would not affect interstate or foreign commerce; that the operation of the proposed project, in conjunction with the regulating dam, would prevent the project from adversely affecting interests downstream since substantially all the natural river flow will be released through the dam at all times; that the proposed project will occupy lands of the United States; that under Section 10a of the Federal Power Act, the proposed project is in the public interest and will provide for comprehensive development of the Deschutes River and will be consistent with further comprehensive development of that stream and of the Columbia Basin (R. 418, 423, 425).

The Federal Power Commission therefore assumed jurisdiction in this case on the sole ground that the proposed project would occupy lands of the United States. In its findings, it eliminated all other jurisdictional grounds.

The petitioners contend, briefly, that under the Desert Land Acts (43 U.S.C.A. 321), the Federal government irrevocably and unconditionally surrendered and relinquished to the State of Oregon whatever rights the government may have had to control the use of the

waters of its non-navigable streams; that common law rule as to "continuous flow" of a non-navigable stream, or riparian doctrine, has been changed by statute and laws of the State of Oregon; that said Desert Land Acts had the effect to sever all waters upon the public domain from the land itself; that the rights, title and interest in and to all waters of the State, and the right to regulate its use, are vested in the State; that the State of Oregon has refused to license the proposed project; that under Section 9b of the Federal Power Act (16 U.S.C.A. 802b), the refusal of the State to approve the project is an absolute bar to the licensing of the project by the Federal Power Commission; hence respondent had no jurisdiction or authority to issue the license to Portland General Electric Company, the Intervenor.

The Petitioners have specified eighteen points on which they intend to rely. These points, obviously, are embraced in the principal contentions of the Petitioners as above set forth. Hence, in the interest of brevity and to avoid unnecessarily belaboring the issues, Petitioner shall not undertake to argue them separately.

THE DESERT LAND ACT (ACT OF CONGRESS,
MARCH 3, 1877, AMENDED 43, U.S.C.A. 321) HAD
THE EFFECT TO SEVER ALL WATERS
UPON THE PUBLIC DOMAIN, NOT
THERETOFORE APPROPRIATED,
FROM THE LAND ITSELF.

From the system of state control, enormous property rights have been developed in the West. The United

States Supreme Court has recognized that rights of water secured by conformity with state laws are vested property rights. There is no provision in the federal constitution delegating to the central government power to control the acquisition and use of non-navigable streams. The government, recognizing this position, has on occasion claimed that the United States has proprietary title in water and hence full power to dispose of and regulate such waters.

In the case of *Kansas vs. Colorado*, 206 U.S. 46, the United States invoked this provision (Clause 2, Section 3, Article IV, United States Constitution) in support of its claim of national control as asserted in that case. The Court there, after referring to the constitution provision said (p. 89): "The full scope of this paragraph has never been definitely settled. Primarily, at least, it is a grant of power to the United States of control over its property. * * * clearly it does not grant to Congress any legislative control over the states, and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits."

Referring to this constitutional provision, i.e., power in the federal government to control the acquisition and use of *Ashwater vs. Tennessee Valley Authority*, 297 U.S. 288, 388, 56 S. Ct. 466:

"The constitutional provision is silent as to the method of disposing of property belonging to the United States. That method, of course must be an appropriate means of disposition according to the nature of the property, it must be one adopted in

the public interest as distinguished from private or personal ends, and we may assume that it must be consistent with the foundation principles of our dual system of government and must not be contrived to govern the concerns reserved to the states."

The states have taken the position that under the Federal Acts of 1866, 1870 and 1877, the federal government irrevocably and unconditionally surrendered or relinquished to the states whatever rights the government may have had to control the use of the waters of non-navigable streams in the West. The first of these federal Acts, that of July 26, 1866 (14 Stat. 251) and the second, that of July 9, 1870, (16 Stat. 217), are codified together as Section 661, Title 43, United States Code, which reads as follows:

"Whenever, by priority of possession rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

The first paragraph of the above quoted section is from the original Act of 1866. The second paragraph is from the amendatory Act of 1870 and had for its purpose the clarification of the 1866 statute.

The third pertinent federal Act is the so-called "Desert Land Law" (Act of March 3, 1877, as amended, 43 U.S.C.A. 321), which, after providing for desert land entries, reads as follows:

" * * * Provided, however, that the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing right."

Section 2 and section 3 of this 1877 Act (19 Stat. 377) further provides:

"Section 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated—

"Section 3. That this act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico

and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office."

The historical background of the Acts of 1866, 1870 and 1877 has been related many times. *Jennison vs. Kirk*, 98 U.S. 453, 25 L. Ed. 240, decided in 1879 contains an account of the 1866 law by Justice Field who did much to mold the form of the earlier decisions. It was there said (*Jennison vs. Kirk*, supra): "The doctrines of the common law respecting the rights of riparian owners were not considered as applicable, or only in a very limited degree, to the condition of miners in the mountains."

With reference to the 1866 Act the decision had this to say:

"It merely recognized the obligation of the government to respect private rights which had grown up under its tacit consent and approval. It proposed no new system, but sanctioned, regulated, and confirmed a system already established, to which the people were attached."

A more recent decision, *California Oregon Power Company vs. Beaver Portland Cement Company*, 295 U.S. 142, 55 S. Ct. 725, decided in 1935 reviews the conditions in the West which lead to the passage of these three federal Acts and states (295 U.S. 157-158):

"The streams and other sources of supply from which this water must come were separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in

the process of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation. And this substitution of the rule of appropriation for that of the common law was to have momentous consequences. It became the determining factor in the long struggle to expunge from our vocabulary the legend 'Great American Desert' which was spread in large letters across the face of the old maps of the far west."

In *Atchinson vs. Peterson*, 20 Wall. 507, 22 L. Ed. 414, Justice Field after referring to the silent acquiescence of the United States in permitting the occupation of the public lands for mining and appropriation of water in connection with those operations said (22 L. Ed. 416, 20 Wal., 507, 513): "This doctrine of right by prior appropriation was recognized by the legislation of Congress in 1866."

In *Basey vs. Gallagher*, 20 Wall. 670, 683, 684; 22 L. Ed. 452, the same judge referred to the 1866 Act and said:

"It is very evident that Congress intended, although the language used is not happy, to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the state or territory, or the decisions of the courts."

In *Broder vs. Natoma Water and Mining Company*, 11 Otto 274, 276; 25 L. Ed. 790, it was held that the Act of 1866 was "rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."

In *United States vs. Rio Grande D. & I. Company*, 174 U.S. 690, 706, 19 S. Ct. 770, it was said: "Obviously by these acts so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow."

Likewise *Gutierrez vs. Albuquerque Land & Irrigation Company*, 188 U.S. 545, 553, 23 S. Ct. 388, held: "By the Act of March 3. 1877, c. 107, 19th Stat. 377, the right to appropriate such an amount of water as might be necessarily used for the purpose of irrigation and reclamation of desert land, part of the public domain, was granted * * *."

In the case of *California Oregon Power Company vs. Beaver Portland Cement Company* (supra), the power company which had appropriation rights from interfering with the water of Rogue River in Oregon. The Court reviewed at length the conditions in the West which lead to the passage of the Acts of 1866, 1870 and 1877, and commented upon these Acts and the decisions construing them. The decision reached was that the appropriation rights of the defendant were good and hence the injunction could not issue. The Court thus summarized its decision (295 U.S. 142, 163, 55 S. Ct. 725):

"What we hold is that following the Act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."

The doctrine of the *California Oregon Power Company* decision has been reiterated in two subsequent opinions of the United States Supreme Court. We quote from *Ickes vs. Fox*, 300 U.S. 82, 95, 57 S. Ct. 412, wherein it was said:

“The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 (c. 107, 19 Stat. 377), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states.”

This same controversy involving the Yakima project in the State of Washington, came before the United States Court of Appeals for the District of Columbia and a decision was rendered by that court on June 30, 1943. The Secretary of Interior attempted to limit the amounts of water which the farmers could secure under contracts with the Bureau of Reclamation to 3 or 3½ acre-feet per acre and to impose an additional charge if more water was desired. The Secretary had urged that the United States was an indispensable party, but the Supreme Court ruled otherwise holding (300 U.S. 82, 95, *supra*) that the appropriation of water was not for the use of the Government, but, under the Reclamation Act, for the landowners, and that the Government was simply a carrier and distributor of water with a lien upon the land and the water rights as security to assure

the repayment of the cost of construction and maintenance. The United States Court of Appeals (*Fox vs. Ickes*, 137 F. (2d) 30) ruled against the Secretary, holding that in the operation of the project he is in the position of a carrier of water to all entrymen under the project and that "he must distribute the available water according to the priorities among the different users which are established by the law of the State of Washington." The Appellate Court went on to say that "the amount of water, to which appellants are entitled by reason of prior appropriations for beneficial use can only be finally determined by a court of the State of Washington."

THE WATERS OF THE STATE OF OREGON MAY NOT BE APPROPRIATED WITHOUT ITS CONSENT.

From and after the date when this act takes effect no right to appropriate or to use the waters of the lakes, rivers, streams or other bodies of water within the state of Oregon, including water over which this state has concurrent jurisdiction, in connection with the development of any water-power project for the generation of electricity, shall be initiated, perfected, acquired or held, except for and during the perior or periods or extensions thereof as herein stated, and pursuant to the provisions hereof. (Ore. L. 1931, ch. 67, sec. 2, p. 82; O. C. 1935 Supp., sec. 47-2102.)

Sec. 119-102, O.C.L.A.

From and after the taking effect of this act, no water-power project involving the use of the waters of any of the lakes, rivers, streams or other bodies of water within the state of Oregon, including waters over which this state has concurrent jurisdiction, for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof. (Ore. L. 1931, ch. 67, sec. 3, p. 83; O. C. 1935 Supp., sec. 47-2103.)

Sec. 119-103, O.C.L.A.

Federal Government has only such powers as are delegated to it by the United States Constitution. All powers not so delegated are by the express provisions of the Tenth Amendment reserved to the states. The power to legislate on the question of acquisition and control of water rights in non-navigable streams has never been delegated to the United States and hence such power properly belongs to the individual states. This position was definitely decided in *Kansas vs. Colorado* (supra), wherein it is said:

"It (a state) may determine for itself whether the common-law rule in respect to riparian rights or that doctrine which obtains in the arid regions of the west of the appropriation of waters for the purposes of irrigation shall control. Congress cannot enforce either rule upon any state."

This principle was followed in the *California-Oregon Power Company* case (supra), the court holding that: "The full power of choice must remain with the state." To the same effect are *United States vs. Rio Grande Dam and Irrigation Company*, 174 U.S. 690, and

Gutierrez vs. Albuquerque Land and Irrigation Company, 188 U.S. 545.

The State of Oregon, by constitution and statute in the adoption of its water code, has determined this right in favor of the appropriation doctrine. Sec. 116-401, O.C.L.A.; Article 11-D, sec. 1, Constitution of Oregon, 1859.

Constitution Article 11-D, section 1, Oregon Constitution, provides the rights, title and interest in and to all water for the development of waterpower and to water power sites, which the State of Oregon now owns or may hereafter acquire, shall be held in perpetuity.

Section 116-401, O.C.L.A., provides:

“All waters within the state (Oregon) from all sources of water supply belong to the public.”

Under the provisions of section 116-401, O.C.L.A. the water of this state may not be appropriated by any person for any purpose without its consent.

Sections 119-102 and 119-103, O.C.L.A., provide in substance that no right to appropriate or to use the water of the lakes, rivers, streams or other bodies of water within the state in connection with the development of any waterpower project for the generation of electricity, shall be initiated, perfected, acquired or held, except in conformity with said act (Hydroelectric Power Act).

In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover imprac-

licable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect thereon a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery and hatchery residence in accordance with said plans and specifications.

Ch. 105, sec. 49, Oregon Laws 1921; O.C.L.A., Sec. 83-316.

The Hydroelectric Commission of Oregon, as a condition precedent to the granting of applicant's application for a preliminary permit, required that it obtain from the Oregon Fish Commission a permit to construct the project in question. For reasons heretofore described, the Fish Committion twice refused to grant such permit.

Under the laws of this state, applicant may not appropriate or use the water of the state in connection

with the development of any waterpower project for the generation of electricity without first having obtained from the Hydroelectric Commission of the State of Oregon a license so to do.

THE FEDERAL POWER COMMISSION HAS NO AUTHORITY TO GRANT TO THE PORTLAND GENERAL ELECTRIC COMPANY, THE APPLICANT, A LICENSE TO CONSTRUCT THE PROJECT IN QUESTION UNTIL THE APPLICANT HAS COMPLIED WITH SECTION 9(b) OF THE FEDERAL POWER ACT BY SHOWING COMPLIANCE WITH THE LAWS OF THE STATE OF OREGON.

This proposition was decided by the United States Supreme Court in *First Iowa Hydroelectric Cooperative vs. Federal Power Commission*, 328 U.S. 152 (1946). The supersedure by the Federal Power Act of *conflicting* state laws was further emphasized by the denial of certiorari when the State of Iowa attempted for the second time to impose its own statute in opposition to the federal license for this project, *State of Iowa vs. Federal Power Commission*, 399 U.S. 979 (1950), in which certiorari was denied thereby affirming the decision of the United States Court of Appeals for the Eighth Circuit, affirming order of the Commission granting the license. 178 Federal 2d, 421 (1949).

In the first Iowa Hydro-electric case (*supra*), petitioner applied to the Federal Power Commission for a license for a power project in Iowa involving the con-

struction of a dam on a *navigable** stream and the diversion of water from two *navigable** streams into another. Petitioner showed no attempt to comply with the Iowa Code, 1939, chapter 363, which forbids the construction of dams and the diversion of water for industrial purposes without a permit from the State Executive Council and authorizing the issuance of such permit upon the finding, *inter alia*, that "Any water taken from the stream * * * is returned thereto at the earliest practicable place." The State intervened and urged that the application be denied because the petitioner did not submit evidence of its compliance with the requirements of the Iowa Code for a permit from the State Executive Council. The Federal Power Commission found that a federal license for the project was required under the Federal Power Act and that the project was required under the Federal Power Act and that the project called for practical and reasonably adequate water power development with certain recreational advantages, all at a cost not appearing to be unreasonable; but it dismissed the application without prejudice on the ground of petitioner's failure to present satisfactory evidence, pursuant to section 9(b) of compliance with requirements of the laws of Iowa requiring a state permit.

The Court held that compliance with the requirements for a state permit under the Iowa Code is not a condition precedent to, or an administrative procedure that must be exhausted before, securing a federal license. In discussing this point the Court said: "It is the Federal Power Commission rather than the Iowa Executive

*Emphasis supplied.

Council that, under our constitutional government, must pass on issues affecting the use of *navigable** waters—on behalf of the people of Iowa as well as on behalf of all others.” (p. 182)

On page 178 it is stated: “Upon the remand of this application to the Commission, it will not act as a substitute for the local authorities having jurisdiction over such questions as the sufficiency of applicant’s legal title to riparian rights or the validity of its local franchise relating to proposed interstate public utility service.” Also on page 178: “The reference in section 9 (b) to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting and distributing power neither adds anything to nor detracts anything from the force of local laws, if any on these subjects.”

Again, on page 167: “On the other hand, there is ample opportunity for the Federal Power Commission, under the power expressly given to it by Congress, to require by regulation the presentation of evidence to it of the petitioner’s compliance with any of the requirements for a state permit on the *state waters of Iowa**; that the Commission considered appropriate to affect the possibility of a federal license on the *navigable** waters of the United States.”

“The securing of an Iowa State permit is not in any sense a condition precedent or an administrative procedure that must be exercised before securing a federal

*Emphasis supplied.

license. It is a procedure required by the State of Iowa in dealing with its *local* streams and also the waters of the United States within that state in the absence of an assumption of jurisdiction by the United States over the *navigability** of its waters. Now that the federal government has taken jurisdiction of such waters (navigable waters) under the Federal Power Act, it has not by statute or regulation added the state requirements to its federal requirements.” (p. 170)

Also, on page 170: “This opposition (to the application) is based, at least in part, on the ground that the state statue, as interpreted by the state officials, expresses a policy opposed to the diversion of water from one stream to another in Iowa under such circumstances as the present.”

The Court further emphasizes its decision on the *navigability** of the streams in question by stating: “The scope of the whole program has been further aided, in 1940, by the definition given to *navigable** waters of the United States in *United States vs. Appalachian Power Company*, 311 U.S. 377. Students of our legal evolution know how this correct interpretation of the commerce clause causes the Commission to lift *navigable** waters of the United States out of local control and into the domain of federal control. It was in the light of these developments that this petitioner in April, 1941, made application for a federal license for this enlarged project. This project thus illustrates the kind of a development, in relation to interstate com-

*Emphasis supplied.

merce and other *navigable** waters of the United States, that is brought forth in a new recognition of its value when viewed from the comprehensive viewpoint of the Federal Power Commission.” (p. 171)

The Court, in disposing of the contention of the State of Iowa further says: The contention of the State of Iowa is comparable to that which was presented on behalf of forty-one states and rejected in this Court in *United States vs. Appalachian Power Company* (supra). The states possess control of the waters within their borders subject to the acknowledged jurisdiction of the United States under the constitution in regard to commerce and the *navigation** of the waters of rivers. It is this subordinate local control that, even as to *navigable rivers**, creates between the respective governments a contrariety of interests relating to the regulation and protection of water through licenses for the operation of structures and the acquisition of projects at the end of the license term. But there is no doubt that the United States possess the power to control the erection of structures in *navigable** waters. The point is that *navigable** waters are subject to national planning and control in the broad regulation of commerce granted in federal government. The license conditions to which objection is made have an obvious relationship to the exercise of the commerce power. Even if there were not such relationship the plenary power of Congress over *navigable** waters would empower it to deny the privilege of constructing an obstruction in these waters. It may likewise grant the privilege on terms. It is in

*Emphasis supplied.

objection to the terms and to the exertion of the power that its exercise is attempted by the same incidents which attempt the exercise of the police power of the states. The Congressional authority under the commerce clause is complete unless limited by the Fifth Amendment." (p. 182) This case illustrates the integration of federal and state jurisdiction in licensing water power projects under the Federal Power Act.

The Deschutes River is a non-navigable stream. It supports no commerce. It is entirely a local stream. Its waters and the use thereof are subject to the sole jurisdiction of the State of Oregon.

Manifestly, the Supreme Court in the First Iowa Hydroelectric case held as it did because of the fact that the Iowa River and the Cedar River were navigable streams and that the proposed diversion of water from the Cedar River would substantially affect the flow and navigable capacity of the Iowa River, and that the operation of the proposed power project would cause fluctuation in the flow and navigable capacity in the Mississippi at Muscatine, Iowa.

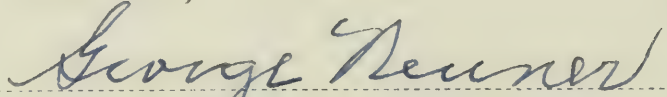
It is clear, therefore, that the refusal of the state agency to grant a permit is not in conflict with the comprehensive development of the Deschutes River under the provisions of the Federal Power Act. There is no conflict between the Oregon laws and the Federal Power Act.

CONCLUSION

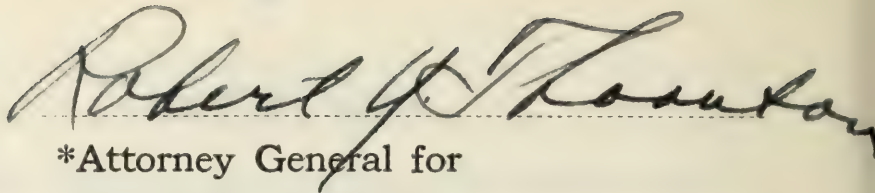
The petitioners respectfully contend that the order of the Federal Power Commission granting a license (major) to the Portland General Electric Company to construct the project in question is in violation of the constitution, statutes and laws of the State of Oregon; that the Federal Power Commission had no jurisdiction, power or authority to issue said order; that said Commission's findings, under Section 10(a) of the Federal Power Act, that the proposed project is best adapted to a comprehensive plan for all the purposes set forth in said statute is not supported by substantial evidence; that said order is in violation of Section 9(b) of the Federal Power Act for the reason that the applicant failed to present any evidence of its compliance with the laws of the State of Oregon with respect to the construction of said project; that the said Federal Power Commission had no jurisdiction, power or authority to authorize said applicant to use, divert and impound the waters of the Deschutes River, an internal, non-navigable stream of the State of Oregon.

WHEREFORE, petitioners respectfully pray that said order of the Federal Power Commission be set aside.

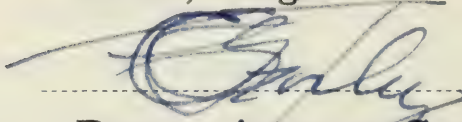
Respectfully submitted,

A handwritten signature in cursive script, reading "George Neuner", written over a horizontal dashed line.

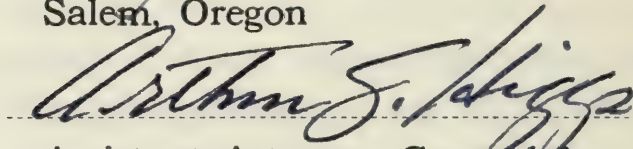
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United States
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COM-
MISSION OF OREGON, THE OREGON
STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COM-
PANY,

Intervenor.

*Petition for Review to Set Aside Order of the
Federal Power Commission.*

**BRIEF OF THE OREGON DIVISION OF THE
IZAAK WALTON LEAGUE OF AMERICA, INC.,
AMICUS CURIAE**

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JAN 19 1953

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1. "Therefore, for the purpose of determining the economic feasibility of the project we find that the total annual cost to applicant of the fish conservation facilities will be \$795,000.00."

2. "* * * that the total annual values attributable to the project will exceed the total annual project costs and losses associated therewith by at least \$351,000. Some additional irrigation diversions may be made in the future at points above the dam site, but until that time the total annual values will exceed costs and losses by about \$450,000."

3. "Furthermore, the serious regional power shortage will not be met by the planned Federal power construction, but additional generating plants must be built as rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with substantial assistance to other power suppliers."

4. "We find nothing in the Army report or the Fisheries Plan which would preclude the issuance of a license for the Pelton project if it is a desirable project in the public interest and meets the standards prescribed by the Federal Power Act."

5. "* * * but there is no evidence to show any serious injury to the sports or recreational fishery. In any event any such injury would be offset to some extent, if not entirely, by the lake fishery and the recreational opportunities to be provided by the project reservoir."

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6. "The Deschutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steelhead trout."

7. "The record shows, as found by the Examiner, that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote."

8. "After examining the record, we are in agreement with the Examiner that no substantial evidence has been brought forward to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased."

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1. "During the five year period 1950-1955, the peak load for the system of Portland General Electric Company will increase by at least 183,000 kilowatts and the energy requirements during the same period will increase by at least 844,300,000 kilowatt-hours, and the load will continue to increase beyond 1955."

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2. "The Pacific Northwest Region has been deficient in dependable capacity to supply the area loads from 1946 to 1951 and will continue to be deficient until 1956, even if all projects now under construction and proposed for construction are constructed and completed in time."

3. "Other hydroelectric sites available to applicant for development in lieu of the Pelton site are limited, more costly and smaller in productive capacity."

4. "The record fails to show that the Deschutes River system above the Pelton site is capable under natural conditions of producing anadromous fish in substantially greater numbers than are now produced there."

5. "There is nothing novel, unusual or out of the ordinary with respect to the fishery conservation facilities proposed by applicant."

6. "The applicant proposes to operate or arrange for the operation of the fish conservation facilities in accordance with approved methods."

7. "Construction, operation and maintenance of the Pelton project will not be detrimental to the fishery resources below the re-regulating dam."

8. "There is no substantial evidence in the record to show that the fishery facilities proposed by the applicant in accordance with the plans prepared by the Fish Commission of Oregon will not maintain existing runs, and there is a possibility that the runs can be increased."

9. "The main reservoir, with elevation 150 feet above the present water elevation, would be more accessible to the public for recreational use, particularly upon completion of a contemplated

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State highway, and will offer recreational opportunities to people from local and distant areas.”

10. “The Portland General Electric Company is a corporation organized under the laws of the State of Oregon and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.”

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United States
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COM-
MISSION OF OREGON, THE OREGON
STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COM-
PANY,

Intervenor.

*Petition for Review to Set Aside Order of the
Federal Power Commission.*

**BRIEF OF THE OREGON DIVISION OF THE
IZAACK WALTON LEAGUE OF AMERICA, INC.,
AMICUS CURIAE**

OPENING STATEMENT

MAY IT PLEASE THE COURT:

This brief amicus curiae is filed pursuant to leave
granted by this Honorable Court, in support of the

petition of The State of Oregon, The Fish Commission of Oregon, The Game Commission of Oregon for review to set aside an order of the Federal Power Commission granting a license (major) to the Portland General Electric Company, Intervenor, to construct, operate and maintain a hydroelectric project on the Deschutes River, an internal, non-navigable river of the State of Oregon, and the right to use, divert and impound the waters of the Deschutes River and its tributaries, all interior, non-navigable rivers of the State of Oregon.

The Petitioners in their brief filed herein have set out a complete and ample statement of the case. In order to avoid duplication and conserve the valuable time of this Honorable Court no further statement of the case will be made in this brief.

The errors of law herein involved are completely set out and argued in the brief of the petitioner and to avoid repetition and duplication and further to lighten the burden on this honorable court amicus curiae hereby adopt the argument of petitioners as to such matters.

**THE FOLLOWING FINDINGS OF FACT MADE
BY THE COMMISSION IN THE OPINION ARE
NOT SUPPORTED BY SUBSTANTIAL
EVIDENCE:**

1. "Therefore, for the purpose of determining the economic feasibility of the project we find that the total annual cost to applicant of the fish conservation facilities will be \$795,000.00.

2. “* * * that the total annual values attributable to the project will exceed the total annual project costs and losses associated therewith by at least \$351,000. Some additional irrigation diversions may be made in the future at points above the dam site, but until that time the total annual values will exceed costs and losses by about \$450,000.”

3. “Furthermore, the serious regional power shortage will not be met by the planned Federal power construction, but additional generating plants must be built as rapidly as possible, especially where, as here proposed, the installation can be made with a minimum loss of time and with substantial assistance to other power suppliers.”

4. “We find nothing in the Army report or the Fisheries Plan which would preclude the issuance of a license for the Pelton project if it is a desirable project in the public interest and meets the standards prescribed by the Federal Power Act.”

5. “* * * but there is no evidence to show any serious injury to the sports or recreational fishery. In any event any such injury would be offset to some extent, if not entirely, by the lake fishery and the recreational opportunities to be provided by the project reservoir.”

6. “The Deschutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steelhead trout.”

7. “The record shows, as found by the Examiner, that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote.”

8. "After examining the record, we are in agreement with the Examiner that no substantial evidence has been brought forward to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased."

BRIEF OF AUTHORITIES

"Under the Federal Power Act, the Circuit Court of Appeals can review an order of the Federal Power Commission, on the challenge that the Commission's finding of fact on which the order is based is not supported by substantial evidence."

Pacific Power & Light Co., et al. v: Federal Power Commission, 98 Fed. (2d) 835, 305 U. S. Sup. Ct. 593.

ARGUMENT

Point I.

There is no substantial evidence in this record to support the finding by the Commission that the annual cost to the applicant of fish conservation facilities would be \$795,000.00. The only evidence in the record concerning such costs that is substantiated by any factual data is from the testimony of Donald R. McKernan (Tr. 777-778, 1003-1007) with the greatest estimate by the witness as to such costs being \$500,000.00. There is testimony on behalf of the applicant of an offer of \$100,000 (Tr. 588) for such expense but this offer is, at no point, substantiated by any factual data to determine how the figure was calculated. It may seem anomalous that we take issue with such finding, since it is greater than the esti-

mates of the experts from the State Fish Commission's staff, but the fact still remains that such finding is not supported by substantial evidence and is subject to review by this Court. /

ARGUMENT

Point II.

This record is utterly devoid of any evidence to support the finding that the values attributable to the project will exceed by \$351,000.00 the costs and lossess associated therewith. The record contains no testimony on this subject whatever. The only evidence touching on this matter being supplied by certain charts and graphs unsubstantiated by the factual data to indicate how the graphs and charts were prepared or on what foundation they rest. Certainly this is not substantial evidence, particularly in view of the fact that the applicant had available to it many engineers and other experts who should have been qualified to testify as to such matters. The Commission itself had four engineers present at the hearing who took part in the proceedings.

ARGUMENT

Point III.

There is no testimony in this record at any point that there is a *serious* regional power shortage. There are some random statements from some lay witnesses that there was a power deficiency in their immediate area but not to the extent that it was regional and that such shortage

may be caused from a lack of adequate transmission facilities considering the distances those witnesses resided from the main transmission lines in the area.

The charts and graphs that are part of the exhibits in this case are not substantiated by any engineering testimony in the record that could and should show how the figures were derived in any way. It seems strange indeed that with so many engineers present and available such testimony is entirely absent from the record.

ARGUMENT

Point IV.

The Army report and the fisheries plan evolved were made after long and intensive study (Tr. 636, 637, 638) and the plans adopted and implemented after meetings in which representatives of the Federal Power Commission took part. While it is true that the Federal Power Commission entered into no signed agreement that it would grant no licenses for construction of power dams on the Deschutes, they certainly either by direct approval or acquiescence confirmed such plans. After the lapse of several years and the expenditure of many thousands of dollars on the part of the other interested bodies in reliance on these plans and such agreements the Federal Power Commission should not now be permitted to deny that those plans, so adopted, are a bar to this license by the process known in the parlance of the streets as "hedging".

ARGUMENT

Point V.

This finding likewise is entirely without evidence to support it. Some of the lay witnesses "expected or thought" that the impoundment "might be better fishing than the river" but they were without any qualification on such matters. The testimony of Charles Campbell, an expert biologist of the Oregon State Game Commission, who was amply qualified to testify on such subjects by both education and experience, gained both generally and in the particular river basin involved, testified that, in his opinion, the recreational and sports fishery would be detrimentally affected (Tr. 699 through 710). No evidence was introduced to show that hydroelectric impoundments in the Northwest, where many exist, afford good sports fishing or even any recreational opportunities.

Recreational opportunities, if any, will be severely curtailed, if not entirely lost, by the tremendous draw down in the impoundment (Tr. 122) which will take place twice each day, to the extent of about six feet each time, since this project will be known as a "peaking plant" (Tr. 122) and operate only at times of heaviest load demand.

The possibility of the State constructing a road into the area is so remote as to be unworthy of consideration. There is no industry or other interests to be served by such road and while the Oregon State Legislature may have ordered a survey, no funds were appropriated for construction, nor has the legislature committed itself to

such an appropriation. In any event, whatever benefits derived from such road, if constructed, would certainly be as readily applicable to the stream in its natural condition as they would be to a lake of 460 acres (Tr. 160) subject to the fluctuations as is the case here.

ARGUMENT

Point VI.

There is no substantial evidence, if any evidence at all, to support this finding. A number of lay witnesses, who were not qualified observers, testified that they had never seen any salmon above the site of the proposed project but none of them, with the exception of F. R. Schanck, testified that there was no salmon or steelhead in the streams. Mr. Schanck, a professional engineer, who has had much to do with engineering surveys on the deschutes and particularly with the Pelton project, was not qualified as a fisheries expert in any manner. His testimony to the effect that there were no salmon in the river prior to the operations of the Oregon Fish Commission, begun in 1937, certainly is not borne out by the testimony of the expert biologists who testified on the same subject (Tr. 464, 761, 783, 812). Mr. Schanck apparently was confused as between the experimental planting of sockeye salmon in 1937 and the start of operations at the Metolius hatchery in 1947 which hatchery was supplied by the eggs taken from a *native* run of spring Chinook salmon (Tr. 812) whose numbers appearing at the trapping racks of the Metolius hatchery averaged 248 fish from 1947 through 1950 (Tr. 846, 847, 848). Obviously, Mr.

Schanck was either a poor observer or he went to extreme lengths to destroy the fishery values of the Deschutes system in an effort to assist the applicant's case. The obvious question that occurs to us at this point is: Why did Mr. Schanck, a qualified engineer with much background and experience in relation to this very project, spend his entire testimony attempting to show that there were no salmon and steelhead in the Deschutes River, a subject on which he was utterly disqualified to testify?

In contradistinction to the testimony of Mr. Schanck the experts called by the State of Oregon from the Oregon State Game Commission and the Oregon Fish Commission, Mr. Charles Campbell (Tr. 689), Mr. Donald L. McKernan (Tr. 768) and Mr. Donald Johnson (Tr. 784) all of whom were qualified biologists and fisheries experts by education and training and further qualified by personal observations and through the work of their respective staff members, testified that salmon and steelhead were produced in the Deschutes River and its tributaries entering the river above the site of the Pelton project, namely the Crooked River, Squaw Creek and the Metolius River.

The Commission apparently failed to distinguish between the fish production of the Deschutes River and the returning adults who were there for reproductive purposes, since it is a well known fact that the reproduction of fish is many times greater than the numbers who survive and return to reproduce their kind. The relation of catch to escapement on Spring Chinook, as established by reputable and competent investigators, is 4.5 to 1. Of summer run steelhead it is 2.2 to 1 (Tr. 783). In the

case of the two above mentioned species of anadromous fish, they produce an average catch in excess of 100,000 pounds of each species by the commercial and sports fishery, based on an average weight of 15 pounds for spring Chinook and 10 pounds for summer run steelhead (Tr. 783) with an average population of 2,500 spring Chinooks and 5,000 summer run steelhead spawning upstream from the site of the Pelton project. One hundred tons of salmon and steelhead taken into the commercial fishery annually from the production of this segment of one river system can not be said to be inconsiderable. Since neither the applicant nor the Federal Power Commission produced a biologist or other competent observer to testify as to the productive capacity of the Deschutes River and its tributaries the testimony of the State's biologists standing alone is conclusive, rendering this finding unsupported by any evidence.

ARGUMENT

Point VII.

The record entirely fails to support the finding that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote. The record conclusively shows that this segment of the Deschutes system produces an estimated annual catch of salmon and steelhead of approximately 100 tons with a spawning population returning for reproduction of 2,500 spring Chinook and 5,000 summer steelhead (Tr. 761) after the catch has been accounted for. The Com-

mission and the trial examiner seem to be confused or they totally lost sight of the evidence as to the catch and took into consideration only the returning spawning populations. There was certainly no competent testimony adduced by either the Commission or the applicant to refute the testimony of the state's witnesses with respect to either the present productivity of the stream or the numbers of fish returning therein to spawn.

The likelihood of the Deschutes becoming a larger producer of fish in the near future was well established by the testimony of Mr. Veatch, Chairman of the Oregon State Fish Commission (Tr. 550) and Mr. Puustinen (Tr. 621). Both of these men have had long experience in fisheries' problems and stream potentials and their testimony was refuted by no one. It is conclusive on this question.

One other very important point to be considered at this time is why did the State of Oregon, in conjunction with the Fish and Wildlife Service of the Department of Interior, undertake the construction in 1947 (Tr. 812), of a large and expensive hatchery for the artificial propagation of the anadromous fish in the Deschutes River system, had there not been every reason, scientific, factual and otherwise, to believe that it would have increased the already sizeable populations using the stream, and would make more fish available to the commercial fishery. This program was commenced several years prior to the time when the application to build this dam had been filed. The record fails to support this finding on the part of the Commission.

ARGUMENT

Point VIII.

Search the record as one may, there is not a single word to support this finding on the part of the Commission. The testimony of the biologists called in behalf of the State of Oregon consistently delineates the losses that the fisheries resources have suffered at other projects similar to the one proposed here (Tr. 670, 679, 680, 699, 700, 701, 702, 709, 710, 779, 780, 781, 816, 819, 821, 830). The expressed opinion of all these biologists was to the effect that the runs of salmon and steelhead could not be maintained by the facilities proposed by the applicant, much less increased. Neither the Commission nor the applicant called any biologist to testify; nor did either of them qualify any witness as a fisheries expert; nor did they offer any evidence of any kind or nature as to the effectiveness of the facilities proposed; apparently relying on the fact that the Oregon State Fish Commission had supplied the plans for the facilities which they were by law required to do (Tr. 775) on request of the applicant. There is no testimony on the part of anyone that the State Fish Commission's plans and specifications, as submitted, would be successful in saving the runs of salmon and steelhead were the dam constructed, or that the facilities would or could offset any of the lost upstream spawning and rearing grounds. The testimony of the engineer, Mr. William R. Farley, a member of the staff of the Federal Power Commission, is extremely significant in this respect, in view of his response to the following question by Staff Counsel:

“Q. Does this investigation involve a consideration of the efficiency and effectiveness of the fish handling facilities proposed by the applicant for the Pelton project?

A. No; but those facilities were considered to the extent that they would affect the annual cost of the project.” (Tr. 615)

Again, at page 617 of the transcript he stated:

“Leaving out the consideration of the effectiveness of the fish handling facilities proposed * * *.”

Why should the studies of this project leave out consideration of these facilities? The question begs the answer: The fisheries resources of the Deschutes system were absolutely disregarded by the Federal Power Commission and the Portland General Electric Company so far as possible and arbitrarily written off with only a token consideration as a mere pretense in considering the interests of the people of the State of Oregon in the destruction of valuable property rights.

**THE FOLLOWING FINDINGS OF FACT MADE
BY THE COMMISSION IN THE ORDER ISSUING
LICENSE ARE NOT SUPPORTED BY
SUBSTANTIAL EVIDENCE:**

1. “During the five year period 1950-1955, the peak load for the system of Portland General Electric Company will increase by at least 183,000 kilowatts and the energy requirements during the same period will increase by at least 844,300,000 kilowatt-hours, and the load will continue to increase beyond 1955.”

2. "The Pacific Northwest Region has been deficient in dependable capacity to supply the area loads from 1946 to 1951 and will continue to be deficient until 1956, even if all projects now under construction and proposed for construction are constructed and completed on time."

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5. "There is nothing novel, unusual or out of the ordinary with respect to the fishery conservation facilities proposed by applicant."

6. "The applicant proposes to operate or arrange for the operation of the fish conservation facilities in accordance with approved methods."

7. "Construction, operation and maintenance of the Pelton project will not be detrimental to the fishery resources below the re-regulating dam."

8. "There is no substantial evidence in the record to show that the fishery facilities proposed by the applicant in accordance with the plans prepared by the Fish Commission of Oregon will not maintain existing runs, and there is a possibility that the runs can be increased."

9. "The main reservoir, with elevation 150 feet above the present water elevation, would be more accessible to the public for recreational use, particularly upon completion of a contemplated State highway, and will offer

recreational opportunities to people from local and distant areas.”

10. “The Portland General Electric Company is a corporation organized under the laws of the State of Oregon and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.”

BRIEF OF AUTHORITIES

“Under the Federal Power Act, the Circuit Court of Appeals can review an order of the Federal Power Commission, on the challenge that the Commission’s finding of fact on which the order is based is not supported by substantial evidence.”

Pacific Power & Light Co. et al. v. Federal Power Commission, 98 Fed. (2d) 835, 305 U.S. Sup. Ct. 593.

ARGUMENT

Points I. AND II.

The record contains not a single word of testimony with respect to the increase in the energy requirements of the applicant. The charts and graphs that were submitted and became exhibits in this record are not in any way supported by the testimony of a single witness to show how the computations were made. Such tabulations can be likened to a ship that has been built and fully equipped but is without fuel to propel it. In such condition the ship is utterly useless as are these charts and graphs.

ARGUMENT

Point III.

This record is utterly devoid of any testimony with respect to other sites available to the applicant, their cost or production possibilities. From what source this finding arose it is impossible to determine from this Record. It is a finding that seems to be plucked from thin air and totally unsupported by evidence of any character.

ARGUMENT

Point IV.

The record entirely fails to support the finding that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote. The record conclusively shows that this segment of the Deschutes system produces an estimated annual catch of salmon and steelhead of approximately 100 tons with a spawning population returning for reproduction of 2,500 spring Chinook and 5,000 summer steelhead (Tr. 761) after the catch has been accounted for. The Commission and the trial examiner seem to be confused or they totally lost sight of the evidence as to the catch and took into consideration only the returning spawning populations. There was certainly no competent testimony adduced by either the Commission or the applicant to refute the testimony or the state's witnesses

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ARGUMENT

Point V.

Since neither the Commission nor the applicant brought forward any biologist or other fisheries expert to testify with respect to the fish conservation facilities

proposed by the applicant there is only the testimony of the experts called on behalf of the State of Oregon that has to do with the subject of those facilities. The testimony of Mr. Farley, an engineer on the staff of the Commission, is totally negative in this respect (Tr. 615, 617). While the testimony of the State's witnesses was to the effect that the operation of the facilities as proposed by the applicant was at the very best experimental and very doubtful as to results (Tr. 679, 680, 766).

ARGUMENT

Point VI.

In the first place, the applicant does not at any point propose to operate the fish conservation facilities, nor does the applicant propose to arrange for their operation, that chore being a burden of the State Fish Commission. The applicant only proposes to construct these facilities and has offered only \$100,000.00 (Tr. 588) as its annual contribution to a total cost of operation that is estimated to be in the neighborhood of \$495,000.00 (Tr. 777, 778, 1003, 1007).

The record is replete with testimony on the part of the State that the facilities proposed have never been successful where tried in other places (Tr. 785, 786, 787, 817, 818, 819, 820, 821) and that these facilities are not in accordance with approved methods.

ARGUMENT

Point VII.

It takes relatively little citation or imagination to show the total falacy of this finding. It is obvious from the ample citations hereinbefore set out that it is the opinion of every biologist who testified that the construction of this project will virtually destroy the anadromous fish using the Deschutes River above the point of construction. Obviously those fish spend some of their life in the Deschutes below the point of construction and enter into the total fishery resources of that area below the point of construction. Mr. Campbell in his testimony stated that the young of the steelhead entered the sports fishery as immigrant fish (Tr. 708, 709). It is obvious that destruction of a run of anadromous fish using the entire river as its highway to the headwaters is certainly going to have a detrimental effect on the entire river system not alone on the spawning grounds. There certainly is no testimony in this record to contradict the state's witnesses on the point and none to support the finding, even by inference.

ARGUMENT

Point VIII.

Search the record as one may, there is not a single word to support this finding on the part of the Commission. The testimony of the biologists called in behalf of the State of Oregon consistently delineates the losses that the fisheries resources have suffered at other pro-

jects similar to the one proposed here (Tr. 670, 679, 680, 699, 700, 701, 702, 709, 710, 779, 780, 781, 816, 819, 821, 830). The expressed opinion of all these biologists was to the effect that the runs of salmon and steelhead could not be maintained by the facilities proposed by the applicant, much less increased. Neither the Commission nor the applicant called any biologist to testify; nor did either of them qualify any witness as a fisheries expert; nor did they offer any evidence of any kind or nature as to the effectiveness of the facilities proposed; apparently relying on the fact that the Oregon State Fish Commission had supplied the plans for the facilities which they were by law required to do (Tr. 775) on request of the applicant. There is no testimony on the part of anyone that the State Fish Commission's plans and specifications, as submitted, would be successful in saving the runs of salmon and steelhead were the dam constructed, or that the facilities would or could offset any of the lost upstream spawning and rearing grounds. The testimony of the engineer, Mr. William R. Farley, a member of the staff of the Federal Power Commission, is extremely significant in this respect, in view of his response to the following question by Staff Counsel:

"Q. Does this investigation involve a consideration of the efficiency and effectiveness of the fish handling facilities proposed by the applicant for the Pelton project?

A. No; but those facilities were considered to the extent that they would affect the annual cost of the project." (Tr. 615)

Again, at page 617 of the transcript he stated:

"Leaving out the consideration of the effectiveness of the fish handling facilities proposed * * *."

Why should the studies of this project leave out consideration of these facilities? The question begs the answer: The fisheries resources of the Deschutes system were absolutely disregarded by the Federal Power Commission and the Portland General Electric Company so far as possible and arbitrarily written off with only a token consideration as a mere pretense in considering the interests of the people of the State of Oregon in the destruction of valuable property rights.

ARGUMENT

Point IX.

The record fails to support this finding when there is taken into consideration the type of operation proposed by the applicant. The impoundment will be only 460 acres in extent (Tr. 160), less than a square mile, and will be subject to a severe fluctuation in level twice each day (Tr. 226, 227) which fluctuation is estimated at six feet at each of the two periods, the reason for this being that the plant will be used as a peaking plant, that is, it will be operated only at times of peak loads estimated at 4 hours per day (Tr. 160). Certainly it takes no stretch of the imagination to visualize the hazards involved in seeking recreation on a lake of 460 acres unnaturally formed in a canyon with steep walls when the lake will be subjected to such fluctuations. There is no testimony that such a lake will afford any recreation, only the hope that it would, expressed by some lay witnesses. There is no evidence in the record that the applicant will make the lake, if and when formed,

available to public use at all or at any time. It will be theirs to operate and control as they please.

The raising of the level of the water by 150 feet certainly isn't going to do a great deal to make the water more accessible to the public except possibly saving a walk of 150 feet at the point where a member of the public desires to go in.

As to the alluded to state highway under contemplation, the record fails to show that such a highway is contemplated. The record goes no further than to show that a survey was ordered — nothing more. That such a highway will be constructed is at this point nothing more than wishful thinking and it is certainly more reasonable to believe that such a road will not be constructed than that it will be constructed, in view of the steep and rocky terrain and the added fact that it will serve no industrial or agricultural purposes. That there is an old railroad bed already there does not change the picture materially, since much work and expense would be involved not only in construction but in maintenance.

In contrast to this, the testimony of Mr. Campbell (Tr. 699 through 710) indicates that there will be substantially less sports fishing available in the impoundment than in the river as it now exists. This coupled with the daily fluctuations that will occur in the impoundment certainly remove any possibility of offsetting recreational losses as a result of the loss of the stream bed.

ARGUMENT

Point X.

The record fails on its face to substantiate the finding that the applicant has complied with all applicable state laws. In fact, the record shows otherwise (Tr. 302) in that the Fish Commission has denied the applicant a permit and that the Hydroelectric Commission of Oregon had not yet granted any permit, both of which permits were required by the statutes of Oregon before any construction could begin. Added to this is the fact that no showing whatever was made that the applicant had received from any state agency the necessary permit to use any of the waters of the Deschutes River or its tributaries.

It is a well known fact that the use of the Deschutes River and its tributaries is necessary if this project is to fulfill its purpose. These streams being internal non-navigable streams of the State of Oregon, are subject to the sole jurisdiction and control of the State in its sovereign capacity. The Supreme Court of the United States, in a long line of decisions beginning at the time when the western part of our great country began to develop and expand, consistently announced and upheld the doctrine that appropriation and use of the waters of the internal non-navigable streams can only be accomplished in conformity with the constitution, laws, customs and usages of the states in which such streams are located.

Jennison vs. Kirk, 98 U.S. 453, 25 L. Ed. 240.

California Oregon Power Company vs. Beaver Portland Cement Company, 295 U.S. 142, 55 S. Ct. 725.

Atchison vs. Peterson, 20 Wall. 507, 22 L. Ed. 414.

Basey vs. Gallagher, 20 Wall. 670, 22 L. Ed. 452.

Broder vs. Natoma Water and Mining Company, 11 Otto 274, 25 L. Ed. 790.

United States vs. Rio Grand D. & L. Company, 174 U.S. 690, 706, 19 St. Ct. 770.

Gutierrez vs. Albuquerque Land & Irrigation Company, 188 U.S. 545, 553, 23 S. Ct. 338.

The United States Supreme Court in one of these decisions, California Oregon Power Company vs. Beaver Portland Cement Company, 295 U.S. 142, 79 L. Ed. 1356, has followed this doctrine and upheld the constitutionality of the Oregon Water Code.

In the more recent case of Ickes v. Fox, 300 U.S. 82, 57 S. Ct. 412, having to do with the waters of the Yakima River in our neighboring State of Washington, the United States Supreme Court again affirmed the rule that waters of internal non-navigable streams could only be appropriated and used in accordance with state laws. Under this long and impressive line of decisions handed down by our highest tribunal it is for the State of Oregon, and the State of Oregon *alone*, to determine what use is to be made of the waters of its internal, non-navigable streams. Whether this use be for irrigation, production of electric energy, or the raising of fish, is a determination entirely within the jurisdiction and control of the State of Oregon. The federal government can not directly or through any of its administrative agencies make this determination, nor can it force its

determination as to the use of the waters of internal non-navigable streams upon the states.

The determination on the part of the State of Oregon as to the use of the waters of the Deschutes River and its tributaries was obviously made when the fish Commission of Oregon refused the applicant intervenor a permit (Ex. 9). Other orders subsequent to the public hearing held by the Federal Power Commission made by administrative agencies of the State of Oregon are on file with the Clerk of this Court and unmistakably show that the State of Oregon has determined that the Deschutes River is not to be used to produce electric energy, in that the applicant has been refused the necessary permits to construct this project. These determinations on the part of the administrative agencies of the State of Oregon are conclusive evidence that the laws of the State of Oregon have not been complied with and that the State of Oregon has made its determination with respect to the uses to be made of the waters of the Deschutes River and its tributaries. This finding on the part of the Commission is not supported by any substantial evidence; in fact, it is *contrary* to the evidence.

One needs little imagination to determine the reason for such a finding; it is the foundation stone upon which the commission could establish its jurisdiction to enter its order. Its hands were otherwise tied. The evidence is so abundant, so obvious, and so conclusive, that the applicant has not complied with all applicable State laws, that it is inconceivable that such a finding could be made. We submit that this and this alone is sufficient for a court of review to strike down the commission's order.

CONCLUSION

Every finding of fact in the opinion and every finding of fact in the order of the Federal Power Commission in this matter has been challenged. Not one of the findings is supported by any substantial evidence, some are not supported by any evidence and some findings are absolutely contrary to the evidence. Amicus curiae respectfully contends that the order granting a license (major) to the Portland General Electric Company to construct the project in question is contrary to the statutes and laws of the United States and the Constitution and laws of the State of Oregon: that the findings of fact in the opinion and order of said Commission are not supported by substantial evidence: that said order is in violation of Section 9 (b) of the Federal Power Act.

Wherefore Amicus Curiae respectfully pray that said order of the Federal Power Commission be set aside.

Respectfully submitted,

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No. 13345

**In the United States Court of Appeals
for the Ninth Circuit**

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON,
THE OREGON STATE GAME COMMISSION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PORTLAND GENERAL ELECTRIC COMPANY, INTERVENER

BRIEF FOR RESPONDENT, FEDERAL POWER COMMISSION

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In the United States Court of Appeals for the Ninth Circuit

No. 13345

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON,
THE OREGON STATE GAME COMMISSION, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PORTLAND GENERAL ELECTRIC COMPANY, INTERVENER

BRIEF FOR RESPONDENT, FEDERAL POWER COMMISSION

JURISDICTIONAL STATEMENT

This is a proceeding under Section 313 (b) of the Federal Power Act ¹ to review an order of the Respondent Commission issuing a license pursuant to Part I of the Act authorizing the Portland General Electric Company ² to construct, operate and maintain a water-power development designated by the Commission as Project No. 2030 and commonly known as the Pelton Project, to be located on the Deschutes River in Jefferson County, Oregon.

The project, if constructed, would occupy lands of the United States set aside on the west side of the Deschutes River by treaty in 1855 as the Warm Springs Indian Reservation, and additional lands of the United States on the east side of the river. All of the lands of the United States on both sides of the river which would be occupied by the project have been withdrawn from entry, location or other disposal under the

¹ 49 Stat. 851; 16 U. S. C. § 791 (a), *et seq.* In lieu of printing as an appendix to this brief the numerous provisions of the Act, which we cite, we are lodging with the Clerk pamphlet copies of the Act for more convenient reference.

² Hereinafter referred to as "the Company."

public land laws and reserved for power purposes. In addition to these lands, some private lands would be affected by the project.

The high power dam, and the powerhouse immediately below, will be located entirely upon lands of the United States set aside and reserved for power purposes. These are the structures which will divert and utilize the waters for power purposes and block the anadromous fish runs—the two features of the project for which State approval has been withheld.

The status of all lands affected is shown in the map attached to the back of this brief. A general map is also attached showing the Deschutes River drainage basin.

The Commission's jurisdiction to entertain the application, and to issue a license for the project, was conferred by the provisions of the Federal Power Act (16 U. S. C. 791a, *et seq.*), particularly Sections 4 (e) and 23 (b). Section 4 (e) authorizes the Commission to issue licenses for project works located "upon any part of the public lands and reservations of the United States," and Section 23 (b) provides, in part, "It shall be unlawful for any person, state, or municipality, for the purpose of developing electric power, to construct, operate or maintain any dam, water conduit, reservoir, powerhouse, or other works incidental thereto * * * upon any part of the public lands and reservations of the United States * * * except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this Act * * *." ³

³ Petitioners state (Pet. Br. 12) that: "The Federal Power Commission found that the Deschutes River is a nonnavigable stream; that the proposed project would not affect interstate or foreign commerce; * * *." An examination of the Commission's opinion, findings, and order (R. 417-447) shows that no such findings were made by the Commission, as alleged by Petitioners. The Commission based its jurisdiction solely on the fact that the project would occupy lands of the United States. Upon consideration of an appropriate record disclosing all of the facts with respect to navigability or nonnavigability of the Deschutes and Columbia Rivers, the Commission might be justified in making the findings required to assert jurisdiction over the project under the commerce clause of the Constitution of the United States. However, the question of the navigability or nonnavigability of the Deschutes River was not raised before the Commission and the Court is without jurisdiction to consider it. *Panhandle Eastern Pipe Line Co. v. F. P. C.*, 324 U. S. 635, 645, 649.

Should the Company attempt to construct its project on lands of the United States without some special authority from Congress, or without a license under the Federal Power Act, the Company could be ousted from the lands.⁴

The Petitioners admit that the proposed project would occupy lands of the United States (R. 503), but controvert the Commission's jurisdiction and authority to issue the license to the Company primarily upon the refusal of the State to approve the project (Pet. Br. 24-25).

COUNTERSTATEMENT OF CASE

Portland General Electric Company, as successor in interest of Northwest Power Supply Company, applied to the Federal Power Commission for a license pursuant to Section 4 (e) of the Act to authorize construction, operation and maintenance of Project No. 2030 (Pelton Project) on Deschutes River in Jefferson County, Oregon.

The project, if constructed, would consist of a concrete arch dam approximately 205 feet high creating a reservoir with normal pool at elevation 1,580 feet; three short penstocks to convey water from the reservoir to a powerhouse, immediately below the dam, containing three 52,000-horsepower turbines operating under a gross head of about 152 feet connected to three 36,000-kilowatt generators making a total installed capacity of 108,000 kilowatts; a spillway; and a transmission line to take the power away from the powerhouse. In addition, there would be a re-regulating dam located about three miles downstream and facilities to conserve the fishery resources at the project site. The re-regulating dam was added to the project at the insistence of the Hydroelectric Commission of Oregon that the Company submit plans for either eliminating or regulating the operational fluctuations of water below the dam to an amount which will not be dangerous to human life or injurious to fish life (R. 506; Ex. 8). Although the project will be utilized as a peaking plant by operating the generating

⁴ *United States v. Utah Power & Light Co.*, 243 U. S. 389; *Pacific Gas & Electric Co. v. United States*, 45 F. 2d 708, cert. den., 283 U. S. 862. See also *F. P. C. v. Idaho Power Company*, 344 U. S. 17.

equipment only during certain periods each day, with the result that there will be wide fluctuations in flow immediately below the powerhouse, the stream flow in the river downstream from the re-regulating dam will be substantially the same as the stream flow without the project because of re-regulation of flow afforded by the re-regulating dam and reservoir.

Since construction of the power dam will block the natural passage of anadromous fish runs, the Company proposes, in order to conserve the fish, to construct certain facilities in accordance with a program suggested by the Oregon Fish Commission (Ex. 12). These facilities may be described generally as the re-regulating dam and facilities at that dam necessary (a) to trap the fish as they proceed upstream to spawn, (b) to hold the trapped fish until they reach sexual maturity, (c) to take eggs from the trapped fish, (d) to haul eggs to the Metolius hatchery, and (e) to haul fingerlings from the hatchery for release in other streams (Exs. 10, 12, 13). In addition, the Metolius hatchery would be enlarged to handle about 14,500,000 Spring Chinook salmon and summer steelhead trout eggs to produce about 340,000 pounds of fingerlings each year (R. 1005-1006; Ex. 12). The capital costs are estimated to be \$3,430,000 for the re-regulating dam and \$1,000,000 for the fish facilities, including enlargement of the existing hatchery (R. 420, 588-589, 591).

Detailed plans of the proposed fish conservation facilities have not been made, but the license requires that in preparing plans and construction schedules for fishery facilities the Company must consult and cooperate with the U. S. Fish and Wildlife Service and the Fish and Game Commissions of Oregon. In addition, such plans must be submitted to and approved by the Commission before construction of the project, and the fishery facilities must be constructed simultaneously with the power facilities in such manner as to maintain the populations of anadromous fish during the construction period and thereafter (R. 445).

The Company is required under the license to bear the expense of operating and maintaining the re-regulating dam and other fishery facilities and has offered to pay \$100,000 annually to the State of Oregon to defray the additional expense

of operating and maintaining the hatchery and other fish facilities required as a part of the project. The record was inadequate to permit the fixing of this operation and maintenance payment, but the license requires the Company to negotiate with the State Fish Commission with respect to the amount of this annual payment. If no agreement is reached, the Commission will subsequently determine the amount to be paid (R. 445-446).

There is no real controversy between the Company and the Petitioners, except for the question of fish conservation (App. A). However, the Petitioners raise certain legal objections to the issuance of the license for the project and question certain findings of the Commission.

The Commission concluded that the project will be in the public interest and will provide for comprehensive development of the affected stretch of the Deschutes River and will be consistent with further comprehensive development of that stream and of the Columbia Basin, including conservation and possible enhancement of the fishery resources of the Deschutes River. In addition, the Commission found that the improvements to be provided by the project will contribute valuable public benefits which will not accrue if the river is maintained in its present natural condition (R. 427). Under these circumstances, the Commission entered its order of February 29, 1952, issuing a license for the project (R. 428-446). It is this order which the Petitioners would have this Court set aside.

The brief of the Oregon Division of the Izaak Walton League of America, Inc., filed as *amicus curiae*, is devoted entirely to an argument that 18 findings made by the Commission in its Opinion No. 222, and its order issuing license for Project No. 2030, are not supported by substantial evidence. The Petitioners made no argument on these findings, but stated they were omitted to avoid duplication (Pet. Br. 15).

It should be noted, however, that there are six findings listed in the Izaak Walton brief as not being supported by substantial evidence which may not be questioned or argued in this Court. These findings are: (1) findings numbered 1, 2, and 3 on pages 2 and 3 of the brief, and argued on pages 4, 5, and 6;

and (2) findings numbered 1, 2, and 3 on pages 13 and 14 of the brief, and argued on pages 15 and 16.

These findings may not be questioned at this time, because Petitioners failed to include them in their statement of points upon which they intend to rely as being findings not supported by substantial evidence, and the subject matter of the findings is not questioned otherwise in the other points upon which Petitioners rely.

In reliance upon Petitioners' statement of points, served at the time they designated the parts of the record to be printed, the Respondent omitted from its additional designation those parts of the record which would show that these six findings are supported by substantial evidence.

The six findings relate to the annual costs of fish facilities; annual values attributable to the project, including the value of the power to be generated; the existing and future power supply and demand in the Pacific Northwest and in the area served by the Company; and the nonavailability to the Company of other adequate hydroelectric sites.

Court Rule 19, paragraph 6, requires Petitioners to file a concise statement of points upon which they intend to rely, and further provides that "the court will consider nothing but * * * the points so stated." Of course, the Izaak Walton League, as *amicus curiae*, may not rely upon points other than those stated by the Petitioners.

At the time counsel for the Commission was preparing Respondent's designation of the record to be printed, the precise question was raised with counsel for Petitioners as to whether he intended to question findings similar to the six involved here. Counsel for Petitioners informed counsel for Respondent that:

I did not, during the hearing before the Federal Power Commission or in the several briefs filed by me, question the testimony relative to power value, power market and any other aspects of the purely power economic and technical phases of the case.

The pertinent portions of the correspondence on this matter appear herein as Appendix A and the Statement of Points, filed by Petitioners, appear as Appendix B.

In view of the above, these six findings are not considered as being before the Court and, consequently, Respondent will not present argument with respect to the question of whether they are supported by substantial evidence.

QUESTIONS PRESENTED

The petition for review raises the following questions for determination by the Court:

1. Has the State of Oregon been given authority to regulate and control the use for power purposes of the waters or the fishery resources in the waters flowing across reserved lands of the United States and across lands within the Warm Springs Indian Reservation which would be occupied by the Pelton Project under a Federal Power Act license?

2. May the United States withdraw any of its public lands from the category of lands to which the Acts of 1866, 1870, and 1877 are applicable?

3. Does Section 9 (b) of the Federal Power Act require State approval of a proposed power project in order to validate a license thereunder?

4. Does the record support the challenged findings upon which the Commission based its order issuing a license for the Pelton Project?

SUMMARY OF ARGUMENT

This controversy concerns the use of reserved Federal lands and the waters of the allegedly nonnavigable Deschutes River on those lands for the development of electric power, notwithstanding refusal of the State of Oregon to approve the proposed construction. The Constitution gave Congress unlimited power to dispose of those lands and the reservation of those lands was within the constitutional authority. No vested water rights are asserted and therefore the cases cited by Petitioners involving water use on public lands under State law where private claims are asserted are not in point. The reservation of the Pelton Project lands severed those lands from the public domain and removed them from Federal statutes of 1866, 1870, and 1877.

A Federal Power Act license may authorize the occupancy of Government lands and the use of water resources thereon. The

intention of Congress to assert control over fishery resources affected by a licensed project is shown by the Federal Power Act and by the Wildlife Resources Act of 1946 and there is no claim here that the United States has consented to State control over the fishery resources within the Warm Springs Indian Reservation lands which will be occupied by the Pelton Project.

The contention of Petitioners that compliance with Oregon laws by this licensee is essential for validity of the Federal license is not supported by the Federal Power Act or decisions thereon. The two cases cited by Petitioners, *First Iowa Cooperative v. F. P. C.*, 328 U. S. 152, and *State of Iowa v. F. P. C.*, 178 F. 2d 421 (C. A. 8, 1949), cert. den., 339 U. S. 979, support the Commission rather than Petitioners. Although the rivers involved in the *Iowa Cooperative* cases were navigable and the Deschutes River is herein alleged to be nonnavigable, the reasoning of the courts in those cases is equally applicable to the comprehensive development under the Federal Power Act of water-power resources on the reserved lands of the United States.

Contrary to contentions of Petitioners, the Commission has not disregarded either the fishery resources or the recreational values in the Deschutes River, but it has provided measures which are designed to preserve and enhance those resources and values. The factual record supports the Commission's findings.

This river is not a particularly plentiful producer of salmon and steel-head trout, especially in recent years. Continually increasing irrigation diversions have completely dried up the upper reaches of the river during low flow periods and the river supports only a remnant of its former fish runs. The measures required by the Commission for fish propagation and protection, based principally upon evidence by the witnesses of Petitioners, give every indication of increasing the usefulness of this stream for fishery purposes and, as a corollary, there is every indication from the experience in other areas that there will be an increase in the recreational use of the river and of the area.

Finally, Petitioners overlook the established judicial recognition of the assignment of responsibility in the issuance of such

licenses. Congress has placed the responsibility upon the Commission, not upon the courts, for deciding what measures should be adopted for the protection of Federal water resources which are to be used for the development of electric power.

ARGUMENT

I. The State of Oregon has not been given the power to regulate or control the use of the waters or the fishery resources in the waters on reserved lands of the United States or on lands within the Warm Springs Indian Reservation to be occupied by the Pelton Project under license

The State lacks power to regulate use of these waters for power purposes

At the outset it should be noted that Petitioners do not contend, nor does the record show, that there are any existing claims under State law to the use of the waters of the allegedly nonnavigable Deschutes River which would be interfered with by use of those waters for power purposes under the Federal license issued to the Company. The original Pelton Project was to consist of the high dam with the power plant immediately below and the reservoir extending upstream. This dam and power plant will cause the obstructions to which the State objects. The re-regulating dam will not provide for power generation but was added at the insistence of the State to smooth out the fluctuations in power plant discharge due to peaking operation.

Therefore, the controversy concerns the right of the United States to license the construction of the high dam and power plant, notwithstanding the objections of the State of Oregon. The question is: Does the validity of the Federal Power Act license depend upon State approval?

All of the cases involving water use under State law cited by Petitioners in support of their contention that the license is invalid, concern controversies or cases between private conflicting claimants, or between private claimants and the United States, to water rights alleged to be vested under State law. Since there is no claim of any vested rights in the waters of the Deschutes River in the instant case, the cases cited by Petitioners are not applicable or controlling.

The constitutional provision under which the Commission, as the agent of Congress, is authorized to issue licenses for power projects on lands of the United States is contained in article IV, section 3, clause 2 of the Constitution of the United States, which provides in part:

The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the territory or other property belonging to the United States * * *.

The power over the lands of the United States thus entrusted to Congress is without limitation and Congress may constitutionally limit the use or disposition of those lands to a manner consistent with its views of public policy. *United States v. California*, 332 U. S. 19, 27 (1947); *United States v. City and County of San Francisco*, 310 U. S. 16, 29 (1940).

In the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters; so far at least as may be necessary for the beneficial uses of the Government property. *United States v. Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 703; cf. *First Iowa Cooperative v. F. P. C.*, 328 U. S. 152, and *United States v. Gerlach Live Stock Co.*, 339 U. S. 725, 739. Thus, to substantiate its claim that it may control the use of the water of the Deschutes River on the lands of the United States involved here, the State of Oregon must show that Congress has given it such power by express grant, since it is not an inherent State right as applied to Federal lands.

Petitioners attempt to make this showing by relying upon the Federal Acts of 1866, 1870, and 1877⁵ by the United States, as irrevocable and unconditional surrender or relinquishment to the State of Oregon of whatever rights the United States had under the Federal Constitution to control the use of the waters of the allegedly non-navigable Deschutes River on the lands of the United States involved here (Pet. Br. 24-33).

⁵ Act of July 26, 1866 (14 Stat. 251) ; Act of July 9, 1870 (16 Stat. 217) ; codified together as 43 U. S. C. 661 ; and Act of March 3, 1877 (43 U. S. C. 321). The pertinent provisions appear on pages 27-29 of Petitioners' brief.

In support of this contention, Petitioners rely upon *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935). However, all that the Court said in that case, so far as relevant here, is that the Desert Land Act of 1877 is applicable where a grantee has taken water rights in accordance with State laws or customs (*Williams v. City and County of San Francisco*, 133 P. 2d 70, 72; cert. den., 319 U. S. 771). No water rights have been granted by the State of Oregon on the Deschutes River which would interfere with the use to be made under the license, and plainly the *California Oregon* case does not suggest that by the Act of 1877 the United States made any general surrender of Federal rights to the State of Oregon, or that prior to State action the United States could not withdraw its Government lands from the class of those to which the 1877 Act was applicable.

The power sometimes delegated by Congress to the States to control water on nonnavigable streams on *public lands* may be withheld (as it was on the Warm Springs Reservation in 1855) or it may be withdrawn (as it was on the lands on the east bank) by changing the status of the lands from public lands to reserved lands and such reservations may be for the use of the United States, or for the use of others.⁶

The lands of the United States on the west side of the Deschutes River were reserved in 1855 by the treaty establishing the Warm Springs Indian Reservation (12 Stat. 963), and part of the lands on the east bank were reserved for power purposes in 1909.⁷ The Indian tribal lands⁸ and the remainder of the public lands were reserved for power purposes by subsequent power withdrawals⁹ and pursuant to the provisions

⁶ *Winters v. United States*, 143 Fed. 740; 207 U. S. 564, 577; *United States v. Conrad Investment Co.*, 156 Fed. 123 (Indian Reservation); Sec. 10 of Stock-Raising Homestead Act of December 29, 1916, 39 Stat. 862; 43 U. S. C. 300 (Public Water Reserves); 30 Stat. 908; 16 U. S. C. 495 (Reservation of Medicinal Springs).

⁷ Power Site Reserve No. 66, created Dec. 30, 1909, by order of the Secretary of the Interior, made permanent by Executive Order of July 2, 1910, pursuant to Act of June 25, 1910 (36 Stat. 847).

⁸ Indian Power Site Reserve No. 2, created Nov. 1, 1910 by the Secretary of the Interior, pursuant to the Act of June 25, 1910 (36 Stat. 855).

⁹ Power Site Reserve No. 294, created by Executive Order of Oct. 8, 1913, pursuant to the Act of June 25, 1910 (36 Stat. 847).

of Section 24 of the Federal Power Act, upon the filing of the application for license for Project No. 57 in 1920, and upon filing of the application for Project No. 2030 in 1949 by the Northwest Power Supply Company.¹⁰

The creation of these reservations brought into play the established principle that the creation of a Federal reservation severs the reserved land from the public domain, disposes of the same, and appropriates it to a public use. *United States v. Minnesota*, 270 U. S. 181, 206 (1926); *Shannon v. United States*, 160 Fed. 870, 873 (C. C. A. 9, 1938). The Acts of 1866, 1870, and 1877 do not apply to those lands set apart and reserved from the public domain. *Minnesota v. Hitchcock*, 185 U. S. 373, 387; *United States v. McIntire*, 101 F. 2d 650 (C. C. A. 9, 1939).

The State has no jurisdiction over fishery resources in these waters

Petitioners cite the Territory of Oregon Act (August 14, 1848, 9 Stat. 328) and certain constitutional and statutory provisions of the State of Oregon in support of the claimed State control over construction of dams in streams in which salmon are found (Pet. Br. 18–20). To the extent that the Territory of Oregon Act or other Federal statutes enacted prior to the Federal Power Act are inconsistent with the provisions of the latter Act, those prior acts are repealed (Federal Power Act, Sec. 29). Therefore, the provisions of the Federal Power Act, providing for comprehensive development of water resources in navigable streams and their tributaries and upon lands of the United States, supersede or repeal any provisions to the contrary in the 1848 statute, or other prior Federal act, insofar as they relate to the Pelton Project.

That Congress did intend to assert Federal control over fish and wildlife resources affected by Federal water projects and by projects to be constructed by *any public or private agency under Federal permit*, is clearly demonstrated by passage of

¹⁰ The pertinent part of Sec. 24 of the Federal Power Act provides:

“SEC. 24. Any lands of the United States included in any proposed project under the provisions of this Part shall from the date of filing of application therefor be reserved from location, entry or other disposal under the laws of the United States until otherwise directed by the Commission or by Congress.”

the Wildlife Resources Act of August 14, 1946 (60 Stat. 1080),¹¹ which provided a procedure for State and Federal cooperation with a view to preventing loss or damage to fish and wildlife resources affected by any such project. This 1946 statute requires that "due consideration be given to the requirements of those resources [fish and wildlife] as well as the requirements of such other resources as may be affected by those programs", as stated in House Report No. 1944, 79th Congress, 2d session.¹² That Act requires that the Federal Power Commission shall consult with the State Fish and Game Commissions to obtain their recommendations with respect to the fish and wildlife resources affected by the Pelton Project, but there is no provision requiring the Commission to adopt the recommendation of the State agencies. Insofar as the 1946 act is concerned, the final decision as to how the fishery resources problem is to be handled is left up to Congress in the case of a Federal project and is left up to the Federal Power Commission in cases involving projects licensed under the Federal Power Act.¹³

¹¹ The statutory provision in question is Sec. 2 of the Act of August 14, 1946, which reads as follows:

"SEC. 2. Whenever the waters of any stream or other body of water are authorized to be impounded, diverted, or otherwise controlled for any purpose whatever by any department or agency of the United States, or by any public or private agency under Federal permit, such department or agency first shall consult with the Fish and Wildlife Service and the head of the agency exercising administration over the wildlife resources of the State wherein the impoundment, diversion, or other control facility is to be constructed with a view to preventing loss of and damage to wildlife resources, and the reports and recommendations of the Secretary of the Interior and of the head of the agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the Fish and Wildlife Service and by the said head of the agency exercising administration over the wildlife resources of the State, for the purpose of determining the possible damage to wildlife resources and of the means and measures that should be adopted to prevent loss of and damage to wildlife resources, shall be made an integral part of any report submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects."

¹² See also Senate Report No. 1698 and Senate Report No. 1748, both of the 79th Congress, 2d session, on H. R. 6097, and also statement by Representative A. Willis Robertson, author of the bill, at pages 12 and 14 of the Hearings before the House Committee on Agriculture, February 13 and April 15, 1946.

¹³ See *State of Iowa v. F. P. C.*, 178 F. 2d 421, 428, cert. den., 339 U. S. 979.

The Petitioners have failed to show that the United States has consented to State control of the fishery resources in the waters of the Deschutes River on lands of the United States reserved for power purposes or reserved for the Warm Springs Indians.

In addition, the treaty between the United States and the Warm Springs Indians, signed in 1855, provides:

* * * Provided, also, That the exclusive right of taking fish in the streams running through and bordering on said reservation is hereby secured to said Indians; * * *.¹⁴

The Warm Springs Indians, by giving their approval of the project as provided by Section 10 (e) of the Federal Power Act, and Article 25 of the license (R. 442) will consent to the use of their lands for power purposes and consent to the interference with their exclusive fishing rights by the project. If the Indians give such approval of the project as licensed by the Commission, the State may not, under the guise of conservation of the fishery resources in that stretch of the stream, prevent the construction of project structures on lands within the Indian Reservation. The Indian Tribe and not the State of Oregon has the final authority to control fishing in the Deschutes River bordering on its reservation and the fishery resources on its lands. The fishing rights and the control of fishery resources, given the Indians or reserved by them in the treaty of 1855, is a continuing one against the United States and its grantees as well as against the State and its grantees. *United States v. Winans*, 198 U. S. 371.

In the order of the Fish Commission of Oregon, dated May 15, 1951 (Ex. 11, p. 2 of order), the State of Oregon concedes that the Warm Springs River, located within the boundaries of the Warm Springs Indian Reservation, is not within the jurisdiction of the State of Oregon. There the State said:

¹⁴ The treaty was not ratified by the Senate until after admission of Oregon into the Union, but the treaty relates back to the time it was signed in 1855 (prior to admission of Oregon). *Anthony v. Veatch*, 189 Ore. 462, 486; 220 P. 2d 493, 502, 503, 221 P. 2d 575.

This river is within an Indian reservation and if the Indian service would consent to the transfer of a hatchery site [on the Warm Springs River] to the State, it is extremely unlikely that it would give state jurisdiction over the river which would be necessary for a successful operation of the hatchery. Unless the state laws could be made to apply to this river, which is wholly within the reservation, we could never protect our operation.

The portion of the Deschutes River west of midchannel in the section involved here is wholly within the Indian reservation and exclusive fishing rights in the entire section are secured to the Indians by the treaty. Consequently, the State is without jurisdiction over the stretch of the Deschutes where the Pelton dam is to be built to the same extent that it lacks jurisdiction over the Warm Springs River with respect to fishery resources in that stream.

Since neither the United States nor the Warm Springs Indian Tribe has consented to the control and regulation by the State of Oregon of their reserved lands or waters or the fishery resources in those waters, the only authority required to construct, operate, and maintain the project on those lands is a license under the provisions of the Federal Power Act, plus the consent of the Indians, as the license provides (R. 442).

It is apparent, therefore, that no State laws with respect to the right to use the waters of the allegedly nonnavigable Deschutes River here or to control fishery resources thereon can apply to such waters on the reserved lands of the United States to be occupied by the Pelton Project. The only laws applicable to this situation are to be found in treaties or statutes of the United States governing the disposition or regulation by the United States of its property.

II. The failure of the company to secure State approval for the Pelton Dam is not a bar under Section 9 (b) of the Federal Power Act to issuance of a license for the project

The Petitioners contend that the Commission has no authority to issue the license for the Pelton Project "until the

applicant [the Company] has complied with Section 9 (b) ¹⁵ of the Federal Power Act by showing compliance with the laws of the State of Oregon" (Pet. Br. 37-42). The contrary holdings in two *Iowa Cooperative* cases are said by Petitioners not to be applicable here, although no real basis for distinction is shown. The two cases which Petitioners would distinguish are *First Iowa Cooperative v. F. P. C.*, 328 U. S. 152, and *State of Iowa v. F. P. C.*, 178 F. 2d 421 (C. A. 8, 1949), cert. den., 339 U. S. 979.

Petitioners argue (Pet. Br. 37-42) that the rationale of those cases is limited to licenses for projects affecting navigable water ¹⁶ and, therefore, does not relieve the Commission of the necessity of requiring the Company to show compliance with the laws of Oregon since the Pelton Project was not found by the Commission to affect navigable waters of the United States. In addition, Petitioners allege that "There is no conflict between the Oregon laws and the Federal Power Act" (Pet. Br. 42) and contend that such a conflict must exist before the holdings in the *Iowa Cooperative* cases are applicable (Pet. Br. 37).

The attack of Petitioners upon the validity of the license is not based upon an alleged lack of constitutional power in the United States to regulate and dispose of its waters, lands, and other property, but is based upon alleged Congressional grants of power to the State of Oregon over property of the United States as expressed in the right-of-way Acts of 1866 and 1870,

¹⁵ Section 9 (b) provides:

"SEC. 9. That each applicant for a license hereunder shall submit to the commission— * * *

"(b) Satisfactory evidence that the applicant has complied with the requirements of the laws of the State or States within which the proposed project is to be located with respect to bed and banks and to the appropriation, diversion, and use of water for power purposes and with respect to the right to engage in the business of developing, transmitting, and distributing power, and in any other business necessary to effect the purposes of a license under this Act."

¹⁶ Lands of the United States were also involved in the *First Iowa* case as the U. S. Supreme Court said (p. 163):

"For the purposes of this application [for license] it is settled that the project will affect the navigability of the Cedar, Iowa and Mississippi Rivers, * * * will flood certain public lands of the United States; and will require for its construction a license from the Commission." [Emphasis supplied.]

the Desert Land Act of 1877, the Territory of Oregon Act of 1848, and Section 9 (b) of the Federal Power Act. However, the legislative history of the Federal Power Act and the provisions of the Act demonstrate conclusively that the Commission's license for the project is valid, notwithstanding the inability of the Company to comply with the laws of Oregon which Petitioners claim are applicable.

Prior to 1920, when the Federal Water Power Act was enacted, water-power projects on lands of the United States could be constructed and operated pursuant to the Act of February 15, 1901 (31 Stat. 790). The 1901 Act related not only to land use but to water use as well, and permission could not be given except upon a finding by the proper official that the proposed development would not be incompatible with the public interest.¹⁷

The Federal Water Power Act of June 10, 1920, combined in one agency the control of water-power developments which had previously been exercised through the Departments of the Interior and Agriculture on lands of the United States and through the War Department on navigable waters. House Report No. 61, 66th Cong., 1st sess., dated June 24, 1919, stated that the purpose of the Power Act was to provide "a method whereby the water powers of the country, wherever located, can be developed by a public or private agency under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every

¹⁷ Act of Feb. 15, 1901, 31 Stat. 790, 16 U. S. C. 79, 522; 43 U. S. C. 959:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forests and other reservations of the United States * * * for electrical plants, poles, and lines for the generation and distribution of electrical power, * * * and for water plants, dams and reservoirs used to promote irrigation * * * or any other beneficial uses * * *: *Provided*, That such permits shall be allowed within or through any of the said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: * * *"

Act of Feb. 1, 1905, 33 Stat. 628, transferred forest reserves from Interior to Agriculture. Thereafter, the Act of Feb. 15, 1901 was applicable to national forests under the Secretary of Agriculture.

legitimate public interest." The efforts of the Commission were to be "directed toward a constructive national program of intelligent, economical utilization of our power resources." This expression of the purpose of the Act would not appear to express any intent by Congress to separate Federal control over land use from Federal control over water use or water-power development, as suggested by Petitioners, since "every legitimate public interest" could not be protected by the Commission without control over both land and water uses, subject, of course, to vested rights not claimed here which are protected by Section 27 of the Act.

In the *First Iowa* case the Supreme Court has this to say concerning the purposes of the Act (pp. 180-181):

It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

It was a major undertaking involving a major change of national policy.²³ That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.

²³ [Note by Court] The nation-wide drive for the passage of this legislation dates back at least to the administration of Theodore Roosevelt and to the enthusiastic support of "the conservationists" led by Gifford Pinchot, as Chief of the Division of Forestry.

"With all its faults the Federal Water Power Act of 1920 marked a great advance. It established firmly the principle of federal regulation of water power projects, limited licenses to not more than fifty years, and provided for Government recapture of the power at the end of the franchise.

"For the first time, the Act of 1920 established a national policy in the use and development of water power on public lands and navigable streams. * * *" Pinchot, *The Long Struggle for Effective Federal Water*

That Congress did delegate authority to the Commission to control water uses is expressly shown by the provisions of the Act. Section 4 (g) authorizes the Commission to investigate "any occupancy of, or evidence of intention to occupy, for the purpose of developing electric power, public lands, reservations * * *" and "to issue such order as it may find * * * in the public interest to conserve and utilize the * * * water-power resources of the region." Section 7 (a) requires the Commission to decide which of conflicting applications is best adapted to conserve in the public interest the water resources of a region. Both of these sections refer directly to the conservation of water resources whether in navigable streams or in non-navigable streams affecting lands of the United States. Section 10 (a) requires that any project licensed shall be best adapted to a comprehensive plan of development and, of course, such comprehensive development is not possible without Commission control over the use of available waters for power purposes.

It is apparent that none of the sections of the Act looking directly to control of water use could be given any meaning in licensing projects on Government lands should the Court accept the Petitioners' interpretation of Section 9 (b) of the Act that the license issued for the Pelton Project is invalid because the Commission failed to require the Company to comply with State laws which Petitioners say control the water resources to be utilized by the project.

Power Legislation (1945), 14 George Washington L. Rev. 9, 19. See also Kerwin, *Federal Water-Power Legislation*, c. VI.

The present Act was distinctly an effort to provide federal control over and give federal encouragement to water power development. It grew out of a bill prepared by the Secretaries of War, Interior and Agriculture. It was recommended by a Special Committee on Water Power created in the House of Representatives at the suggestion of President Wilson. See Statement by Representative Sims, Chairman of the Committee on Water Power, 56 Cong. Rec. 9797, 9798. * * * "The problems are national, rather than local; they transcend state lines and cannot be handled adequately except by or in conjunction with national agencies." Statement by David F. Houston, Secretary of Agriculture, quoted in H. R. Rep. No. 61, 66th Cong., 1st Sess., p. 5.

Furthermore, if the Petitioners' contention (Pet. Br. p. 16, point 5; pp. 20; 26) that Congress did not delegate to the Commission authority to control water use for power purposes is valid, then Section 27 of the Act¹⁸ is meaningless insofar as it protects certain water rights vested under State law. If Petitioners are correct in this argument, then the Commission cannot interfere with *any* vested or potential water rights, whether protected by Section 27 or not.

In the *First Iowa* case, the supreme Court held that Section 27 does not protect vested rights in water appropriated for generation of electric power.¹⁹ Consequently the Commission is not compelled by the provisions of either Section 9 (b) or Section 27 of the Act to require compliance by the Company with the Oregon laws with respect to acquisition of water rights upon lands of the United States for power purposes. There being no claim here that vested rights have been acquired for the protection of which State intervention is necessary, Section 27 is not applicable.

Moreover, insofar as the claims of Petitioners rest upon other Federal statutes, such claims are unsupportable for there is direct repeal of conflicting Federal statutes by Section 29 of the Federal Power Act which provides: "That all Acts inconsistent with this Act are hereby repealed * * *" This repealing

¹⁸ "SEC. 27. That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

¹⁹ "The effect of § 27, in protecting state laws from supersedure, is limited to the laws as to the control, appropriation, use or distribution of water in irrigation or for municipal or other uses of the same nature. It therefore has primary, if not exclusive, reference to such proprietary rights. The phrase 'any vested right acquired therein' further emphasizes the application of the section to property rights. There is nothing in the paragraph to suggest a broader scope unless it be the words 'other uses.' *Those words, however, are confined to rights of the same nature as those relating to the use of water in irrigation or for municipal purposes.*" [Italics added.] (pp. 175-176.)

clause finds effect in the requirements of Section 10 (a) and other provisions of the Power Act limiting licenses to those projects which conform to the best plan for comprehensive development of the water resources, whether in navigable streams or in nonnavigable streams on Government lands. The repealing clause of Section 29, therefore, makes it clear that if the Acts of 1866, 1870, 1877 and the Territory of Oregon Act of 1848 are inconsistent with the Federal Power Act in their grant of powers to Oregon, they are repealed to the extent that they may be inconsistent with the regulation and control of the reserved Federal lands to be occupied by the Pelton Project. *First-Iowa Cooperative v. F. P. C.*, *supra*.

At page 181 the Court said in that case:

The detailed provisions of the [Federal Power] Act providing for the federal plan of regulation leave no room or need for conflicting state controls.²⁰

Here the impact of the State laws would be precisely the same as in the *First Iowa* case. Both States would prohibit power plants authorized by the Commission; in this case under fishery laws and in the *First Iowa* case under an antidiversion statute.

Finally, even if it be assumed for the purposes of argument that there is no conflict between the Oregon laws and the Federal Power Act, as Petitioners contend (Pet. Br. 37), nevertheless the license is valid. This principle was established in the *First Iowa* litigation. In its decision the Supreme Court said (p. 178):

²⁰ Another Court of Appeals recently held that the costs of water power rights alleged to have been acquired under State law were properly chargeable as project operating expenses, *Niagara Mohawk Power Co. v. F. P. C.*, C. A. D. C., case No. 10862, decided December 31, 1952. However, the court was not required to rule upon the necessity for compliance with State laws to validate operation of the project under the FPC license. One Judge dissented and the Commission has recommended to the Solicitor General that a petition for certiorari be filed.

The references made in § 9 (b) [Federal Power Act] to beds and banks of streams, to proprietary rights to divert or use water, or to legal rights to engage locally in the business of developing, transmitting, and distributing power neither add anything to nor detract anything from the force of local laws, if any, on those subjects.

* * * * *

The need for compliance with applicable state laws, if any, arises not from this federal statute [Federal Power Act] but from the effectiveness of the state statutes themselves.

When the second *Iowa Cooperative* case was before the Eighth Circuit on appeal this principle was again expressly stated. That Court said (178 F. 2d at page 427):

We gather from the opinion of the Supreme Court that, while the Federal Power Commission may properly concern itself with the question whether an applicant for a license can comply with applicable state laws, if any, relating to the proposed project and the business in which the applicant proposes to engage, the Commission is not compelled to do so, but may license the project and let the licensee take his chances of being able to comply with the applicable state laws, or such of them as have not been superseded by the Federal Power Act. We think that the challenged orders of the Commission may not be invalidated by this Court because of the asserted noncompliance by the Commission with § 9 (b) of the Act.

Thus it is apparent that the Oregon laws relied upon by Petitioners here, whether in conflict with the Federal Power Act or not, can be no bar to the issuance of a valid license for the Pelton Project.

III. Petitioners' contentions with respect to fishery resources and recreation are without basis in law

Petitioners contend that several findings of fact made by the Commission in its opinion and in its order issuing a license for the Pelton Project are not supported by substantial evidence (I. W. L. Br. 2-4, 13-15).²¹ Only those findings stated to be objectionable in Petitioners' statement of points upon which they intend to rely (App. B) are before the Court and only those findings will be considered in this brief. (For failure to preserve other objections, see *supra* 5-6.) The Commission findings questioned relate to the anadromous and sports fishery resources and recreational uses in the Deschutes River.

Petitioners, speaking through the Izaak Walton League, would have the Court believe that the Commission, with callous disregard of local interests, deliberately authorized the destruction of valuable fishery resources through the construction of this power development in such a way as to completely prevent the use of this stream for any other purposes, including the propagation of fish, with the attendant loss in recreational and commercial values. This was not the case, but on the contrary the Commission required a substantial initial investment (\$4,430,000, R. 420) by the licensee and large annual expenditures (\$795,000, R. 421, 437), several times greater than the fishery values given by witnesses for Petitioners, in order to preserve and possibly enhance the value of this stream as a fishery resource. As a matter of fact, if there is any unreasonableness shown by the record before the Court it lies at the door of those who would preserve the fishery values of this stream by preventing any development of these water-power resources, notwithstanding the extraordinary measures directed to harmonize both types of water use.

Indeed, the several values of these water resources were recognized by the Commission in its finding that the proposed

²¹ The objections to the Commission's findings of fact and the argument thereon are contained in the brief filed by The Oregon Division of the Izaak Walton League of America, Inc. as Amicus Curiae, which speaks also for Petitioners (Pet. Br. 15). We, therefore, regard the arguments as those of Petitioners.

development would be best adapted to comprehensive development of this region (R. 439):

(44) Under present circumstances and conditions, and upon the terms and conditions hereinafter provided in the license, the project is best adapted to a comprehensive plan for the improvement and utilization of waterpower development, for the conservation and preservation of the fish and wildlife resources, and for other beneficial public uses including recreational purposes.

This finding, which conforms to the provisions of Section 10 (a) of the Power Act,²² is the only finding relating to the beneficial public purposes (including recreation and conservation of fish) required by the licensing statute.

In Petitioners' assignment of errors (Pet. Br. ii-vii and I. W. L. Br. i-iv) this finding is not questioned and the only direct reference to it is an undocumented statement by Petitioners in their "conclusion" (Pet. Br. 43) to the effect that it is not supported by substantial evidence.

Section 313 (b) of the Power Act expressly provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. Inasmuch as Petitioners made no attempt to present any facts or to show a lack thereof which might suggest that this statutory finding made pursuant to Section 10 (a) is not a finding of fact or that it is not supported by substantial evidence, it is conclusive and binding on this review.

The findings questioned by Petitioners are incidental to this required statutory finding.²³ An examination of the record

²² Section 10 (a) provides, in part:

SEC. 10. All licenses issued under this Part shall be on the following conditions:

"(a) That the project adopted * * * shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways * * * for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes."

²³ The Court of Appeals for the District of Columbia Circuit, in discussing incidental findings to a required statutory finding said that even if some of the incidental findings were unsupported, the orders under review should be affirmed since without them there would still be a basis in the record for the Commission's conclusions. *Panhandle Eastern Pipeline Company v. F. P. C.*, 169 F. 2d 833, cert. den., 335 U. S. 854.

clearly demonstrates that, contrary to the contentions of Petitioners, the findings in question are supported by substantial evidence.

The Commission in its opinion set forth the facts and reasons in support of its finding "that nothing in the Army report or the Fisheries Plan * * * would preclude the issuance of a license for the Pelton Project" (R. 423-424). There the Commission said:

But it should be noted that the Army review report contains no discussion of possible power development at or near the Pelton site, and consequently, the applicant's proposal is not contrary or inconsistent with the Army's recommendations for power development on the Deschutes River. While Congress has appropriated funds for the Fisheries Plan, Congress has not given its approval to that plan or to the basin plans of the Army engineers.

In addition to those facts, which have not been controverted or denied by Petitioners, the evidence shows that the Deschutes River need not be considered as essential to the Lower Columbia Fishery Plan in view of the rights of the Warm Springs Indian Tribe to all fish in the Warm Springs River and in the Deschutes and Metolius Rivers where they form the boundary of the Indian Reservation (*supra* 14-15), and due to the additional fact that the Oregon State legislature, although urged to do so, failed to enact a proposed bill in 1949 to establish the Deschutes River as a fish refuge by prohibiting the construction of power dams on that river (R. 560). The facts show conclusively that the finding is amply supported.

The finding that "there is no substantial evidence to show any serious injury to sports or recreational fishery * * *" is based upon the estimate of Petitioners' own witnesses that the value of the sport fishery claimed to be lost by the flooding of 12 miles of the river would be about \$2,000 per mile or \$24,000 annually (R. 703, 727-728, 747-748), a relatively small loss and not a serious one when compared with the remaining hundreds of miles of stream available for sports fishery. This loss also is not serious when considered in connection with the

\$450,000 annually which the Commission found to be the net value of the project (R. 421-422). The stretch of the river to be flooded is not now readily accessible to fishermen or for recreation use, being in a deep canyon (R. 594-596). There is evidence that fishermen very seldom use the stretch of the river immediately above and below the dam site (R. 594). The project dam and reservoir will raise the water surface 150 feet making the reservoir readily accessible for fishing and other recreational use, particularly if the State constructs a proposed highway through the canyon (R. 586, 596-597, 605-607). In addition, roads to be built to the dam during construction of the project will be later available for use by fishermen and recreationists (Ex. 13). Aside from the fishing, the reservoir will provide other recreational opportunities not now available in the area. It is, of course, common knowledge that artificial reservoirs in the Pacific Northwest attract people from local as well as distant areas for sightseeing, picnicking, boating and lake fishing. There is no evidence in the record to indicate that the Pelton reservoir will not become a similar recreation area.

The "tremendous drawdown" stressed by Petitioners as being detrimental to recreational use of the reservoir (I. W. L. Br. 7) will average about six feet (Tr. 486-487) and will scarcely be noticeable nor will it make the area around the reservoir less attractive since the canyon walls are steep and thus no unsightly mud flats will be exposed upon drawdown (Tr. 470).

There is an abundance of evidence to support the finding that "the Descutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steelhead trout" and the same evidence amply support the further finding that "the likelihood of its becoming so [above the Pelton site] in the near future is rather remote" (R. 426).

Continually increasing irrigation diversions have completely dried up the upper reaches of the Deschutes and Crooked Rivers during low flow periods and consequently the Deschutes River now supports only a small remnant of its former salmon and steelhead runs and sports fish (R. 720; Rev. Rep. Col.

River, App. P, pp. 60-61), a situation which cannot be attributed to the proposed dam.

There is no substantial evidence in the record that the Deschutes River will ever produce more fish in its natural state than it does now. Although the spawning beds have been surveyed qualitatively (Ex. 30-A, 30-B, 30-C) no quantitative measurements have been made (R. 714-715, 1021-1022). No studies have been made of the productive capacity of the existing fishery (R. 806, 1022) or of the migrations of the fish (R. 748). Although the fish productivity of a stretch of river is limited by its rearing capacity (R. 993-994) no studies have been made to determine this factor in this stream (R. 1022, 1030). All of this information would be required to support Petitioners' contentions that the Deschutes can, in its natural state, produce substantially more anadromous fish than it is now producing (I. W. L. Br. 10-11).

The Deschutes, like any other river, is capable of producing only a certain number of fish of all types. This productive capacity is determined in a large measure by the natural environment, particularly the amount of natural fish food available. Since the Deschutes River system is a large producer of resident trout fish (R. 726-727; Ex. 31, p. 1), a large portion of the productive capacity of the river system is necessarily devoted to the maintenance of those trout. Consequently, only the productive capacity not being utilized by the resident trout, the predominant fish in the stream, is available to maintain the anadromous fishery. Further, the natural production of anadromous fish is limited by the fact that resident trout eat young salmon and steelhead (R. 752) and also carry diseases which are very injurious to anadromous fish (R. 995-996).

Attempts made by Petitioners' witnesses to use intuitive estimates (R. 1017-1018) and comparisons with other streams with dissimilar characteristics and with different runs of anadromous fish (R. 1029-1030), do not constitute an adequate basis to question the findings.

The Deschutes River is not a relatively large producer of anadromous fish above the Deschutes site. Petitioners estimated that 2,500 salmon and 5,000 steelhead migrate past the site each year, but no fish counts were made to substantiate this.

These estimates were only rough guesses based on an average annual entrapment at the Metolius racks of 258 salmon annually (R. 760–761, 846–848, 865, 871, 916–921, 929–930) and the steelhead estimate was based on even less substantial guesses (R. 872, 874–876, 921–923). The Metolius racks and fish trap capture substantially all of the salmon migrating that far upstream (R. 848). Even if these inadequately supported estimates are accepted, they do not show that the Deschutes is now a plentiful producer of salmon and steelhead trout (R. 194). Furthermore, the fact that the State and the Federal governments were willing to spend substantial sums in the construction and operation of the Metolius hatchery in an effort to rehabilitate the fish runs indicates that the Deschutes is not now a plentiful producer.

The Commission's finding that no substantial evidence was brought forward to show that the facilities proposed for conserving the fish runs will not maintain existing runs and its further finding that there are indications that the runs can be increased (R. 426, 437) are based almost entirely upon evidence presented by Petitioners which demonstrated conclusively that the runs can be maintained and possibly increased. The proposed facilities have been planned in accordance with a program set up by the Oregon Fish Commission (Exs. 10, 12, 13) which advised that the plan is the only one with any great chance of success (Ex. 12, last page). Doubt was raised with respect to the success of the operation of the fish conservation facilities on several grounds, including suitability of water for holding adult fish, injury to fish, losses in holding ponds, disease, and dietary matters (R. 766–777, 794–795, 802, 840–842, 995–996). The record shows, however, that there is an adequate supply of suitable water of proper temperature available from springs which feed directly into the reservoir if the water from the reservoir should prove unsuitable (R. 600–601); that Spring Chinook salmon have been held successfully in artificial ponds elsewhere (R. 718, 720); that Spring Chinook salmon are now being successfully trapped without undue injury in the Metolius; and that the success in raising young Spring Chinook salmon at the North Santiam hatchery above the Detroit dam in Oregon indicates that disease and other problems associated

with rearing young Spring Chinook salmon are not too serious (R. 785–786). The experimental work being done at that hatchery will also be helpful in planning and operating the Metolius hatchery above the Pelton site (R. 786–787, 794–795). There is no evidence that artificial propagation of steelhead trout will not be successful at the Metolius hatchery in view of the success experienced with resident trout (R. 794–795). These facts, when considered with the failure of the fish experts to point out any unique feature in the plan, not only support the finding relative to the success in maintaining runs, but also show that “there is nothing novel, unusual, or out of the ordinary with respect to the fishery conservation facilities proposed by applicant” as found by the Commission (R. 437). Admittedly there is ample evidence in the record with respect to the success of artificial propagation of anadromous fish (R. 570; Exs. 2, 12, 29, 34).

The Commission found that the applicant proposes to operate or arrange for operation of fish conservation facilities in accordance with approved methods and the license provisions will require such operation (R. 445–446). Moreover, the applicant has agreed on the record to defray the additional hatchery expenses and the cost of operating and maintaining the fish facilities at an annual cost of about \$795,000 (R. 421, 437).

The construction, operation, and maintenance of the project will not be detrimental to the fishery resources below the regulating dam. This dam was insisted upon by the Hydroelectric Commission of Oregon (R. 506; Ex. 8). The project will be operated in such a manner as to maintain flows below that dam of the same magnitude as would exist under natural conditions in order to maintain that section of the river in its existing condition for the benefit of fish life, as desired by the State (Exs. 9, 10). It has not been shown that the quality of water to be released from the Pelton reservoir will be detrimental to fish downstream. Comparison of the Aerial reservoir on Lewis River (Ex. 32) with Pelton is inconclusive with respect to quality of water to be provided by Pelton because adequate correlations of watersheds, drawdowns, storage cycle, run-off, and types of ground cover, were not made (R. 819, Tr. 1240–1241).

The findings of the Commission on all of the contested factual points are supported by substantial evidence. Nevertheless, Petitioners in effect ask the Court to review the evidence merely because they call attention to the portions which they regard as favorable to their arguments and ignore contrary evidence. This, of course, is asking the Court to reach a conclusion opposite to that reached by the expert body set up by Congress for the purpose of making the decisions called for by the Federal Power Act. Such weighing of technical evidence is clearly contrary to the statutory scheme of judicial review provided in Section 313 (b) of the Act and contrary to established principles.

The Court cannot substitute its judgment for that of the Commission. As was said by the Supreme Court, in *National Labor Relations Board v. Link-Belt Company*, 311 U. S. 584, 597:

Congress entrusted the Board, not the Courts, with the power to draw inferences from facts. *National Labor Relations Board v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 271; *National Labor Relations Board v. Falk Corp.*, 308 U. S. 453, 461. The Board, like other expert agencies dealing with specialized fields (see *Rochester Telephone Corp. v. United States*, 307 U. S. 125, 146; *Swayne & Hoyt v. United States*, 300 U. S. 297, 304), has the function of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony.

The Commission found from its analysis of the evidence that the proposed Pelton Project is in the public interest; will provide for comprehensive development of the affected stretch of the Deschutes River; will be consistent with further comprehensive development of that stream and of the Columbia basin; and that the improvements proposed will not accrue if the river is maintained in its present natural condition (R. 427). On the basis of this finding and conclusion the Commission issued a license for the Pelton Project containing conditions which the Commission found would conserve and possibly enhance the fishery resources of the Deschutes River (R. 427).

As there is a rational basis and substantial evidence for the Commission's conclusions, they are binding on Court review. *State of Iowa v. F. P. C.*, *supra*, at pages 427-428; *Montana Power Company v. F. P. C.*, 112 F. 2d 371, 374; *Rochester Tel. Corp. v. United States*, 307 U. S. 125, 146; *Market Street R. Co. v. Railroad Comm.*, 324 U. S. 548, 559-560.

The Petitioners' contentions that the Commission's findings are not supported are without basis in law and the Commission's order must stand unless the Court is to substitute its judgment for that of the Commission on the adaptability of the project to the comprehensive development of the water resources involved, a substitution not permissible under the review provisions of Section 313 (b) of the Federal Power Act.

CONCLUSION

The order of the Federal Power Commission here under review is valid, is based upon substantial evidence of record, and should be affirmed.

BRADFORD ROSS,
General Counsel,

WILLARD W. GATCHELL,
Assistant General Counsel,

JOHN C. MASON,
Attorney,

Counsel for Respondent, Federal Power Commission.

FEBRUARY 1953.

APPENDIX A

FEDERAL POWER COMMISSION,
Washington 25, July 7, 1952.

Hon. ARTHUR G. HIGGS,
*Assistant Attorney General of Oregon,
1634 Southwest Alder Street, Portland 8, Oregon.*

Re: *State of Oregon, et al. v. Federal Power Commission,*
No. 13345

DEAR MR. HIGGS: I am filing today respondent's designation of additional parts of the record and the executed stipulation submitted by you concerning use of exhibits by the Court and also concerning the September 1, 1951, order of the Oregon Commission. A copy of my letter to the Clerk of the Court and 15 copies of our designation is being sent under separate cover.

* * * * *

Under points upon which petitioners intend to rely you list:

5. Under Section 10 (a) of the Federal Power Act, the proposed project is not in the public interest.

In view of the fact that your other points and the findings you challenge relate primarily to questions of law and to the fishery resource and recreational issues, we have assumed that your statement of point 5 does not go beyond the subject matter of your other points. With this in mind we have omitted substantially all of the testimony relative to power value, power market and other aspects of the purely power and economic phases of the case. Your advice will be appreciated as to the correctness of our assumptions concerning your point.

* * * * *

Sincerely yours,

(S) JOHN C. MASON,
Attorney.

OREGON STATE GAME COMMISSION,
1634 S. W. ALDER STREET,
Portland 8, Oregon, July 11, 1952.

Received July 16, 4:48 p. m., 1952, Federal Power Commission.

Mr. JOHN C. MASON,
*Attorney, Federal Power Company,
Washington 25, D. C.*

Re: *State of Oregon et al., v. Federal Power Commission,*
United States Court of Appeals, Ninth Circuit, No. 13345

DEAR MR. MASON: This will acknowledge receipt of and thank you for your letter of July 7, 1952, in which you informed me that you had on that day filed respondent's statement of points and designation of the record.

* * * * *

You are correct in your assumption that our statement of point 5 does not go beyond the subject matter of our other points. I did not, during the hearing before the Federal Power Commission, or in the several briefs filed by me, question the testimony relative to power value, power market and other aspects of the purely power economic and technical phases of the case.

* * * * *

Sincerely yours,

(S) ARTHUR G. HIGGS,
Assistant Attorney General.

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

* * * * *

No. 13345, Civil

* * * * *

IN THE MATTER OF PORTLAND GENERAL ELECTRIC COMPANY
(AND NORTHWEST POWER SUPPLY COMPANY)

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON,
THE OREGON STATE GAME COMMISSION, INTERVENORS,
PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

* * * * *

PETITION FOR REVIEW TO SET ASIDE AN ORDER OF THE FEDERAL
POWER COMMISSION

PETITIONERS' STATEMENT OF POINTS AND DESIGNATION OF RECORD

Pursuant to Rule 19, Paragraph 6 of this Court, the State of Oregon, the Fish Commission of Oregon, and the Oregon State Game Commission, petitioners, hereby make the following statement of points on which they intend to rely in this proceeding, together with a designation of all of the record which is material to the consideration of the review herein.

POINTS ON WHICH PETITIONER INTENDS TO RELY

1. The Federal Power Commission does not have jurisdiction, power, or authority to authorize and to license the construction, operation, and maintenance of the proposed project.

2. The Deschutes River and its tributaries are internal and nonnavigable streams of the State of Oregon.

3. The proposed project will not affect interstate or foreign commerce.

4. The operation of the proposed project in conjunction with the re-regulating dam will prevent the project from adversely affecting interests downstream, and will not affect the navigable flow or the navigable capacity of the Columbia River.

5. Under Section 10 (a) of the Federal Power Act, the proposed project is not in the public interest.

6. There is no provision in the Federal Constitution delegating to the central government power to control the acquisition and use of nonnavigable streams.

7. Under the Acts of Congress of 1866, 1870 and 1877 (Desert Land Acts 43, U. S. C. A. 321), the Federal Government irrevocably and unconditionally surrendered, or relinquished to the States, including the State of Oregon, whatever rights the Government may have had to control the use of the waters of nonnavigable streams.

8. Under the Territory Act of Oregon of August 14, 1848, it was provided that rivers and streams of water in the Territory of Oregon in which salmon are found, shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.

9. Under the Constitution and laws of the State of Oregon, no person may construct a dam in any of the streams of this State to a height that will make a fish ladder or fishway thereover impracticable, without first having obtained from the Fish Commission of Oregon a permit to construct such a dam.

10. Under the provisions of Section 116-401, O. C. L. A., all waters within the State of Oregon, from all sources of water supply, belong to the public.

11. The common law doctrine of riparian rights has been abrogated in Oregon by statute.

12. Under the Constitution of Oregon, 1859, the rights, title, and interest in and to all water for the development of water power, and to water power sites which the State of Oregon owns or hereafter acquires, shall be held in perpetuity.

13. Under the provisions of the Oregon Water Code, the waters of the State of Oregon may not be appropriated without its consent.

14. No right to appropriate or to use the waters of the lakes, rivers, streams, or other bodies of water within the State of Oregon, including water over which the State has concurrent jurisdiction in connection with the development of any water power project for the generation of electricity, shall be initiated, perfected, acquired or held, without the consent of the State of Oregon.

15. The Federal Power Commission may not act as a substitute for the local authorities over such questions as the right to use, appropriate, divert, or impound the waters of a non-navigable stream in the State of Oregon.

16. The Federal Power Commission has no authority to allocate the use of the waters of the Deschutes River and its tributaries in connection with the Pelton project under the license granted to the Portland General Electric Company.

17. The Federal Power Commission has no authority to grant to the Portland General Electric Company, the applicant, a license to construct the project in question until the applicant has complied with Section 9 (b) of the Federal Power Act by showing compliance with the laws of the State of Oregon.

18. The Fish Commission of the State of Oregon had denied a permit to the Portland General Electric Company to construct the Pelton Dam.

19. The Hydroelectric Commission of Oregon has denied the Portland General Electric Company's application, and supplemental applications, for a preliminary permit to construct the hydroelectric project in question.

THE FOLLOWING FINDINGS OF FACT MADE BY THE COMMISSION
ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

1. We find nothing in the Army report or the Fisheries Plan which would preclude the issuance of a license for the Pelton project if it is a desirable project in the public interest and meets the standards prescribed by the Federal Power Act.

2. * * * but there is no evidence to show any serious injury to the sports or recreational fishery. In any event any such injury would be offset to some extent, if not entirely, by the lake fishery and the recreational opportunities to be provided by the project reservoir.

3. The Deschutes River is not now, nor has it been in recent years, a particularly plentiful producer of salmon and steel-head trout.

4. The record shows, as found by the Examiner, that the Deschutes River above the Pelton site is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is rather remote.

5. After examining the record, we are in agreement with the Examiner that no substantial evidence has been brought forward to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased.

6. The record fails to show that the Deschutes River system above the Pelton site is capable under natural conditions of producing anadromous fish in substantially greater numbers than are now produced there.

7. There is nothing novel, unusual or out of the ordinary with respect to the fishery conservation facilities proposed by applicant.

8. The applicant proposes to operate or arrange for the operation of the fish conservation facilities in accordance with approved methods.

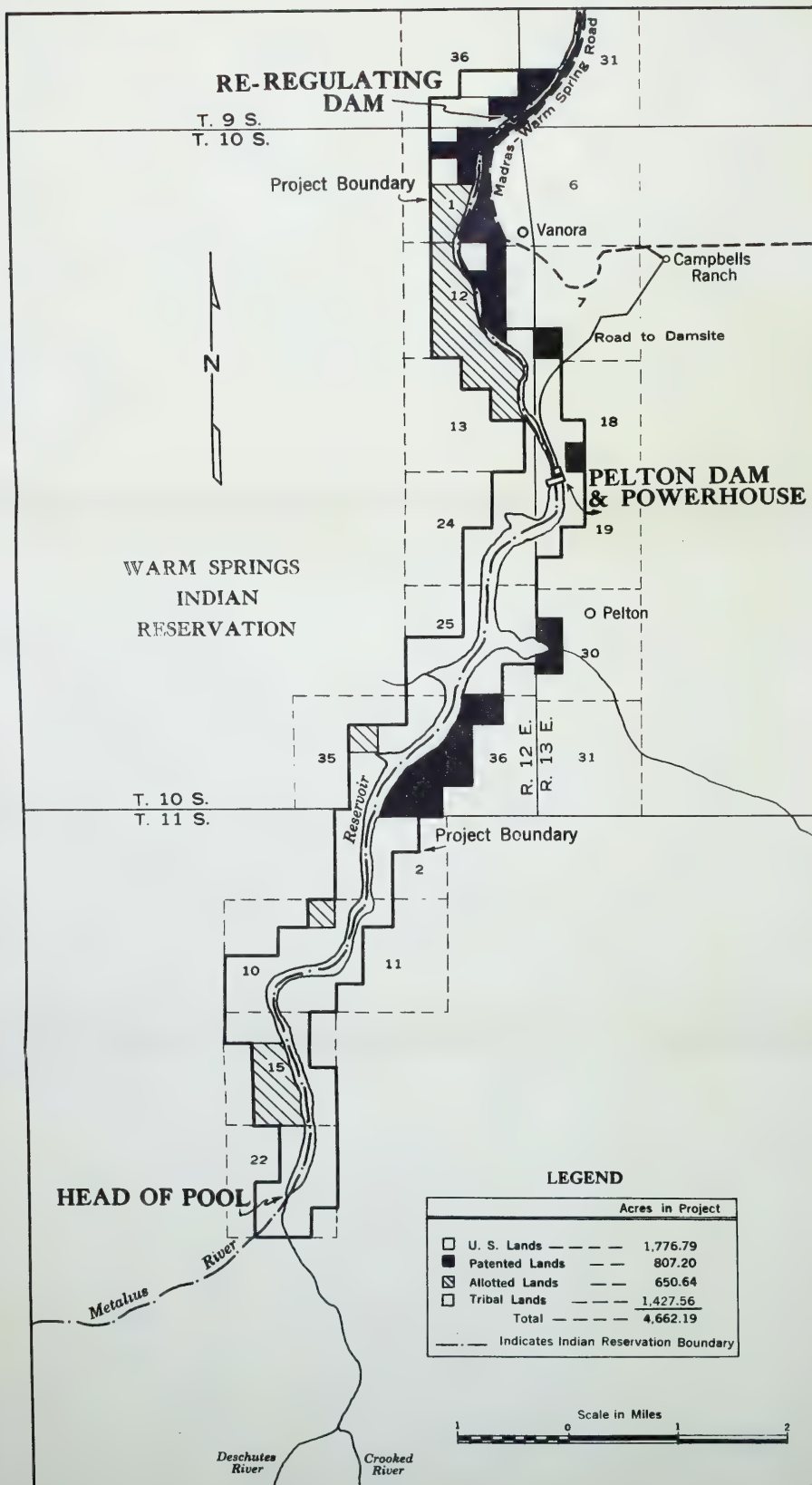
9. Construction, operation and maintenance of the Pelton project will not be detrimental to the fishery resources below the re-regulating dam.

10. The Portland General Electric Company is a corporation organized under the laws of the State of Oregon and has submitted satisfactory evidence of compliance with the requirements of all applicable State laws insofar as necessary to effect the purposes of a license for the project.

DESCHUTES RIVER DRAINAGE BASIN



SOURCES OF INFORMATION: APPENDIX K-PLATES 21 & 36
 "REVIEW REPORT ON COLUMBIA RIVER AND TRIBUTARIES"
 CORPS OF ENGINEERS, DEPT. OF ARMY - OCT. 1, 1948, PRINTED AS
 HOUSE DOCUMENT 531, 81 ST. CONGRESS, 2 ND SESSION
 AND EXHIBIT 3 IN RECORD.



No. 13345

UNITED STATES
COURT OF APPEALS

For the Ninth Circuit Court

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

*Petition for Review to Set Aside Order
of the Federal Power Commission*

BRIEF OF INTERVENOR PORTLAND GENERAL ELECTRIC COMPANY IN ANSWER TO BRIEF OF PETITIONERS, THE FISH COMMISSION OF OREGON AND THE OREGON STATE GAME COMMISSION.

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FILED

FEB 1 1958

PAUL P. O'BRIEN

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UNITED STATES
COURT OF APPEALS

For the Ninth Circuit Court

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

*Petition for Review to Set Aside Order
of the Federal Power Commission*

BRIEF OF INTERVENOR PORTLAND GENERAL ELECTRIC COMPANY IN ANSWER TO BRIEF OF PETITIONERS, THE FISH COMMISSION OF OREGON AND THE OREGON STATE GAME COMMISSION.

OPENING STATEMENT

In view of the statement of facts set forth in petitioners' brief, any additions thereto by the intervenor will be very brief.

The intervenor filed its petition with the Federal Power Commission seeking a major license to be issued to Portland General Electric Company to construct and maintain a hydroelectric project on the Deschutes River. The petition was filed pursuant to the Federal Power Act. U. S. C. A. Sec. 791a, et seq.

The Deschutes River is a tributary of the Columbia River. The Deschutes River may not actually be used for navigation at the site of the Pelton dam, but there is no question as to the navigability of the Columbia River, of which the Deschutes is a tributary.

The proposed project on the Deschutes River would occupy lands which are owned by the United States government (R. 158, 331, 433). The lands on the east side of the river are owned by the United States government and reserved for power purposes under references made hereafter in the brief. The land on the west side of the river is owned by the United States government as a reservation for the Warm Springs Indians.

The Confederated Tribe of Warm Springs Indians was a party to the proceeding before the Federal Power Commission and offered no objection to the issuance of a license for the proposed project. (R. 354). The land within the boundaries of the Warm Springs Indian Reservation was defined in a treaty of the United States dated June 25, 1855 (R. 543, 546). A portion of the Deschutes

and Metolius Rivers forms a part of the boundaries of the Indian Reservation. The Deschutes River at the Pelton site where the Portland General Electric Company proposes its project is on a portion of the Deschutes River which forms such boundary. The Indian Treaty of 1855 provided, among other things, "that the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians."

Neither the Fish Commission of Oregon nor the Oregon State Game Commission has made any claim to ownership or proprietorship of either land, water, or use of water at the site of the proposed project.

The findings of the Federal Power Commission to which the petitioners take exception as shown in petitioners' brief, may be subdivided into the following major points:

1. Jurisdiction of the Federal Power Commission, including the effect upon navigation of a tributary stream and the authority of the United States through the Federal Power Commission to exercise control by reason of ownership of lands.

2. The authority of the federal government over water and the use of water in streams flowing through or bordering on lands owned by the United States.

3. Statutes of Oregon with respect to use of water and the public necessity of using the same for power purposes.

4. The absence of any rights resting in the Fish Commission of Oregon or the Oregon State Game Commission by reason of the implied repeal of a 1921 statute, because of the subsequent enactment of the Hydroelectric Act of Oregon in 1931, and by reason of the fact that the petitioners are not aggrieved parties under the Federal Power Act.

5. The proprietary right of the United States to grant a license through the medium of the Federal Power Commission, including the right of use land and the right to use water for such a project.

I.

JURISDICTION OF THE FEDERAL POWER COMMISSION

Points 1 to 4 inclusive, shown on pages 15 and 16 of petitioners' brief, all pertain to the jurisdiction of the Federal Power Commission and for purposes of brevity will be treated together under this heading.

POINTS AND AUTHORITIES

Navigability

1.

Under the Federal Power Act the United States has jurisdiction over power projects in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states or upon any part of the public lands and reservations of the United States.

USCA Title 16, Section 797 (e).

II.

The navigable waters of the United States as defined in the Federal Power Act are very broad.

USCA Title 16, Section 796 (8).

III.

The authority of any state is limited by the paramount authority of the United States as to the tributaries of navigable streams and also streams bordering on lands owned by the United States.

The Daniel Ball v. U. S., 77 US 557, 10 Wall. 557, 19 L. Ed. 999.

U. S. v. Rio Grande Irrigation Co., 174 US 690, 703, 708, 19 S. Ct. 770, 43 L. Ed. 1136.

U. S. v. Appalachian Power Co., 311 US 377, 61 S. Ct. 291, 85 L. Ed. 243. *Rehearing denied* 312 US 712, 61 S. Ct. 548, 85 L. Ed. 1143. *Petition denied* 317 US 594, 63 S. Ct. 67, 86 L. Ed. 487.

U. S. v. Utah, 283 US 64, 75 L. Ed. 844.

IV.

The jurisdiction of the United States extends to tributaries of navigable streams even though such tributaries may not be navigable.

U. S. v. Appalachian Power Co., 311 US 377, 61 S. Ct. 291, 85 L. Ed. 243.

Oklahoma v. Atkinson, 313 US 508, 85 L. Ed. 1487.

Georgia Power Company v. Federal Power Commission, 152 Fed. 2d. 908, 913.

Grand River Dam Authority v. Going, 29 Fed. Sup. 316, 323.

ARGUMENT

The Federal Power Act was first enacted in 1920. *Title 16 USCA, Section 791a. et seq.* The general purpose of the act appears to provide a proper co-ordination over the waters of the United States which might in any way affect navigation and has been upheld by the courts under the commerce clause of the United States Constitution.

The court will note under the act, *Title 16 USCA, Section 797 (e)*, that jurisdiction of the Federal Power Commission is founded upon two major premises. The

first covers improvements in streams or other bodies of water under which Congress has jurisdiction, and among the several states. The second is upon ownership of the public lands or reservations by the United States. The matter of property ownership by the United States will be treated hereinafter in this brief.

Under the navigability features of the Federal Power Act it was interpreted in the usual manner for some years depending upon a factual showing of actual navigation within the stream in question. This was a strict interpretation of the general rule of navigability. However, as time progressed, the boundaries of interpretation expanded and the United States Supreme Court in 1940 rendered its decision in the case of *United States v. Appalachian Electric Power Company*, 311 US 377, 85 L. Ed. 243, 261, 262. This is sometimes known as the "New River Case." The New River rises in northwest North Carolina near the Virginia line and runs for approximately 250 miles through Virginia and West Virginia where it unites with the Gauley River to form the Kanawha River, which in turn flows into the Ohio River. The opinion of the lower court, *United States v. Appalachian Electric Power Company*, 107 Fed. 2d. 769, 781, gives an extensive discussion of the characteristics of the river, pointing out that the peculiar geologic formation of the rocky bed due to folds and faults in the

rock strata produced ledges running across the stream in many places. The water in many places falls over the ledges almost vertically. Some of the ledges are up-thrust above the surface of the water and some are barely submerged. However, in spite of the factual situation which would ordinarily indicate non-navigability, the United States Supreme Court in its opinion said the following:

“The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, i. e., to ‘prescribe the rule by which commerce is to be governed.’ This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; ‘that the running water in a great navigable stream is capable of private ownership is inconceivable.’ Exclusion of riparian owners from its benefits without compensation is entirely within the Government’s discretion.

Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may

make the erection or maintenance of a structure in a navigable water dependent upon a license. This power is exercised through Sec. 9 of the Rivers and Harbors Act of 1899, 33 USCA Sec. 401, prohibiting construction without congressional consent and through Sec. 4 (e) of the present Power Act, 16 USCA Sec. 797 (e).

* * * * *

“In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. As respondent soundly argues, the United States cannot by calling a project of its own ‘a multiple purpose dam’ give to itself additional powers, but equally truly the respondent cannot, by seeking to use a navigable waterway for power generation alone, avoid the authority of the Government over the stream. That authority is as broad as the needs of commerce. Water power development from dams in navigable streams is from the public’s standpoint a by-product of the general use of the rivers for commerce. To this general power, the respondent must submit its single purpose of electrical production. The fact that the Commission is willing to give a license for a power dam only is of no significance in appraising the type of conditions allowable. It may well be that this portion of the river is not needed for navigation at this time. Or that the dam proposed may function satisfactorily with others, contemplated or intended. It may fit in as a part of the river development. The

point is that navigable waters are subject to national planning and control in the broad regulation of commerce granted the Federal Government."

This court will observe that this broad interpretation recognizes the fact that any tributary of a navigable stream becomes important in maintaining navigation by reason of its flow into a navigable stream and providing the water for navigation.

This same interpretation of the Federal Power Act is found in *Georgia Power Company v. Federal Power Commission*, 152 Fed. 2d. 908, 913 involving a power project on the Oconee River in northeastern Georgia which was a remote tributary of a navigable stream. In its decision the court said:

"(6) We fully agree with the Fourth Circuit that: 'One of the purposes of the Water Power Act was to authorize the Commission to license dams in navigable waters of the United States in lieu of an Act of Congress; and in our opinion one of the purposes of section 23 *** was to likewise take care of the case of a proposed structure in a non-navigable tributary of an interstate navigable stream.' *United States v. Appalachian Electric Power Co.*, 4 Cir., 107 F. 2d 769, 795."

See also *Pennsylvania Water and Power Company v. Federal Power Commission*, 123 Fed. 2d. 155.

In *Grand River Dam Authority v. Going*, 29 Fed. Sup. 316, 325, the court said:

“(16) It seems clear that the United States is interested in any sort of project on a non-navigable tributary to a navigable river that tends to affect the volume of water naturally coming into the navigable stream from the tributary. This Court is of the **opinion that the Federal Power Commission had jurisdiction to investigate the question with respect to the Grand River Dam and issue a license to the Grand River Dam Authority.**”

Although the Appalachian Power Company case was a far-reaching decision, there seems to be no question but what it made a final determination of the fact that the tributaries of every navigable stream and the right to use water in such tributaries for the development of power projects is within the purview of the Federal Power Act and that such projects are under the jurisdiction of the Federal Power Commission.

In the instant case the Deschutes River is an immediate tributary of the Columbia River and there appears to be no question as to the navigability of the Columbia River.

II.

JURISDICTION BY REASON OF OWNERSHIP OF LANDS.

POINTS AND AUTHORITIES

I.

Jurisdiction of the Federal Power Commission is premised upon the ownership of public lands and reser-

vations of the United States.

USCA Title 16, Section 797 (e).

II.

A state cannot by legislation destroy the right of the United States as the owner of lands bordering on a stream, to retain jurisdiction over the waters thereof.

U. S. v. Rio Grande Dam and Irrigation Co., 174 US 690, 19 S. Ct. 770, 43 L. Ed. 1136.

Utah Light and Power Company v. U. S., 243 US 389, 410, 61 L. Ed. 791.

California-Oregon Power Company v. Beaver Portland Cement Co., 295 US 142, 79 L. Ed. 1356, 1362.

III.

The United States under the terms of the Federal Power Act has paramount jurisdiction over lands owned by the United States and full control of the streams passing through the same.

U. S. v. San Francisco, 310 US 16, 29, 60 S. Ct. 749, 84 L. Ed. 1050. *Re-hearing denied* 310 US 657, 60 S. Ct. 1071, 84 L. Ed. 1420.

Federal Power Commission v. Idaho Power Company ——US——, 97 L. Ed. (*Advance Sheets*, p. 9).

ARGUMENT

The land upon which the Pelton Project is situated is owned by the United States government. The Deschutes River forms the easterly boundary of the Warm Springs Indian Reservation. The land on the east side of the Deschutes River is owned by the United States, having been withdrawn from entry and reserved for power purposes as hereinafter referred to.

The record before this court shows an original application in 1920 by the Columbia Valley Power Company, Inc. at substantially the same site as the Pelton Project. The Columbia Valley Power Company never fully carried through its construction of such project. The ownership of land, however, is therein shown to be in the United States government (R. 18, 19, 20). The description of the land is also shown in the record at page 157 and 158 as Exhibit F attached to the application of Northwest Power Supply Company. A similar showing is made on pages 224 and 225 of the record. See also the findings of the Examiner and the recommended decision (R331, 332) and order issuing license (R430).

Further evidence as to the ownership of lands was included in the record before the Federal Power Commission but was not made a part of the record in this court. The testimony of A. G. Sunda (Federal Power Commission record 809) and Waldemar Seton (Federal Power

Commission record 653) also referred to the ownership of these lands. Part of the testimony of F. R. Schanck is included in the record, but the court will note on page 579 of the printed record that a portion of the testimony of Mr. Schanck before the Federal Power Commission was omitted, being from pages 388 to 400, inclusive, of the record before the Federal Power Commission. Mr. Schanck in his testimony, which was not brought before this court, referred to water supply paper of the Geological Survey, No. 344, entitled "Deschutes River, Oregon and its Utilization" under which it is shown that the lands involved in this power project were withdrawn from entry by the United States government in 1910 and reserved for power purposes. The withdrawals for water power sites were made pursuant to the Act of June 25, 1910, *USCA Title 43, Section 141*, and a similar act of the same date pertaining to Indian reservations, *USCA, Title 43, Section 148*. The United States asserts further jurisdiction over such public lands which may be used for power purposes under the provisions of the Federal Power Act, *USCA Title 16, Section 818*.

In *Camfield v. U. S.*, 167 US 518, 526, 42 L. Ed. 260, the United States Supreme Court pointed out that even though public lands are within a state this does not prevent the United States government from exercising jurisdiction over the property, and even the admission of a

territory as a state does not deprive the government of the power of legislating for the protection of the public lands therein, even though it may involve the exercise of the police power.

This was further emphasized by the United States Supreme Court in *United States v. Rio Grande Dam and Irrigation Company*, 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, where the court said:

“Although this power of changing the common-law rule as to streams within its dominion undoubtedly belongs in each state, yet two limitations must be recognized; First, that in the absence of specific authority from Congress *a state cannot by its legislation destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters*; so far at least as may be necessary for the beneficial uses of the government property. Second, that it is limited by the superior power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the general government over interstate commerce and its natural highways vests in that government the right to take all needed measures to preserve the navigability of the navigable watercourses of the country even against any state action.” (Emphasis ours).

The petitioners in the instant proceeding take the position that the sole jurisdiction for the granting of water rights or granting a permit for a power project rests in in the State of Oregon. The United States Supreme Court has decided this issue in many cases, including *Utah*

Power and Light Company v. United States, 243 US 389, 410, 61 L. Ed. 791, 816, where the court pointed out that in many instances a state has civil and criminal jurisdiction over property of the United States within its limits but such jurisdiction does not extend to any matter that is not consistent with full power in the United States to protect its lands, to control their use, and to prescribe in what manner others may acquire rights in them.

In the case of *California-Oregon Power Company v. Beaver Portland Cement Company*, 295 US 142, 79 L. Ed. 1356, 1362, the United States Supreme Court pointed out the limitations upon this state power as follows:

“Two limitations of state power were suggested: first, in the absence of any specific authority from Congress, that a state could not by its legislation destroy the right of the United States as the owner of lands bordering on a stream to the continued flow—so far, at least, as might be necessary for the beneficial use of the government property; and second, that its power was limited by that of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. With these exceptions, the court, however, thought (p. 706) that by the acts of 1866 and 1877 ‘Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow,’ and that ‘the obvious purpose of Congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common law rule, which permitted the appropriation of those waters for legitimate industries’.”

See also *United States v. San Francisco*, 310 U. S. 16, 84 L. Ed. 1050.

III.

THE FEDERAL GOVERNMENT IS PARAMOUNT TO STATE STATUTES AS TO UNITED STATES PROPERTY.

POINTS AND AUTHORITIES

I.

Congress of the United States has full power to make any and all necessary regulations respecting property belonging to the United States.

U. S. Constitution Article IV, Sec. 3, Clause 2.

U. S. v. Rio Grande Dam and Irrigation Company,
174 U. S. 690, 19 S. Ct. 770, 43 L. Ed. 1136, 1141.

Forbes v. U. S., 125 F. 2d. 404, 408.

U. S. v. City and County of San Francisco, 310 US
16, 29, 60 S. Ct. 749, 84 L. Ed. 1051. *Rehearing denied*, 310 US 657, 60 S. Ct. 1071, 84 L. Ed. 1420.

II.

The right to regulate United States property also includes the right to use and regulate water running across such United States property.

Winters v. U. S. 207 US 564, 577, 52 L. Ed. 340, 346.

U. S. v. Walker River Irrigation District, 104 F. 2d. 334, 336.

U. S. v. McIntire, 101 F. 2d. 650, 653.

III.

The power of the federal government to reserve waters and to exempt them under the state laws cannot be denied.

U. S. v. Big Bend Transit Co., 42 Fed. Sup. 459, 467.

In re Water Rights of Hood River, 114 Or. 112, 172, 227 P. 1065.

ARGUMENT

Counsel for petitioners set forth as points upon which they would rely (Petitioners' brief, page 16, paragraphs 5 and 6), that there is no provision in the federal Constitution delegating to the federal government power to control the acquisition and use of non-navigable streams and claim that the Desert Land Act surrendered and re-

linquished to the states all rights with respect to the use of waters of non-navigable streams.

The founders of the federal Constitution in the original drafts thereof did not provide for a property clause. However, during the course of the Constitutional Convention, the property clause was tendered by Charles Pinckney of South Carolina. 5 *Elliott, Debates on the Federal Constitution*, 128-132. Toward the end of the Convention, the property clause was made a part of the Constitution. It is embodied as Article IV, Section 3, Clause 2, which gives the federal government full power and authority over property of the United States and which is not to be restricted by any state legislature.

This provision was discussed by the United States Supreme Court in *Rio Grande Dam and Irrigation Company*, 174 *US* 690, 19 *S. Ct.* 770, 43 *L. Ed.* 1136, 1141, where it emphatically stated that a state by its legislature cannot destroy the rights of the United States as the owner of lands bordering on a stream, to the continued flow of its waters. It is to be noted that the above case was decided subsequent to the Desert Land Act of 1877.

The same constitutional provision was alluded by the United States Supreme Court in *U. S. v. San Francisco*, 310 *U. S.* 16, 29-30, 60 *S. Ct.* 749, 84 *L. Ed.* 1051, 1059 as follows:

“Article 4, Sec. 3 cl. 2 of the Constitution provides that ‘The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States.’ The power over the public land thus intrusted to Congress is without limitations. ‘And it is not for the courts to say how that trust shall be administered. That is for Congress to determine.’ Thus, Congress may constitutionally limit the disposition of the public domain to a manner consistent with its views of public policy. And the policy to govern disposal of rights to develop hydro-electric power in such public lands may, if Congress chooses, be one designed to avoid monopoly and to bring about a widespread distribution of benefits.”

See also *United States v. California* 332 U. S. 19, 91 L. Ed. 1889, 1893.

In the recent case of *Federal Power Commission v. Idaho Power Company* — U. S. —, 97 L. ed (*Advance sheets* p. 9, 12), decided November 10, 1952, the Supreme Court said:

“Part I and Part II provide different regulatory schemes. Part II is an exercise of the commerce power over public utilities engaged in the interstate transmission and sale of electric energy. See S. Rep No. 621, 74th Cong, 1st Sess, p 17. Part II does not undertake to regulate public lands or the use of navigable streams. That function is covered by Part I, which dates back to the Federal Water Power Act of 1920, 41 Stat 1063. Section 4 (e) of Part I gives the Commission power to issue licenses to private or public bodies for the purpose of ‘constructing operating and maintaining dams, water conduits,

reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or *upon any part of the public lands and reservations of the United States . . .* (Italics added.)”

The same principle has been recognized by the State of Oregon through its supreme court *in re Water Rights of Hood River*, 114 Or. 112, 172, 227 P. 1065 where the Supreme Court of Oregon stated :

“20. The case of *United States v. Rio Grande Irr. Co.*, 174 U. S. 690, 702 (43 L. Ed. 1136, 19 Sup. Ct. 770), is authority for the statement that it is undoubtedly true that a state may change its common-law rule as to every stream within its dominion and permit the appropriation of the flowing water for such purposes as it deems wise. This authority is limited, in the absence of the consent of Congress, so that the state cannot destroy the right of the United States to water necessary for beneficial use for government property and by the superior power of the government of the United States to prevent interference with the navigation of navigable streams.”

In the case of *Winters v. U. S.*, 207 US 564, 577, 52 L. Ed. 340, 346, the question revolved about the right of the United States to the water of Milk River in the state of Montana. The United States asserted control over the water by reason of the fact that the river flowed

through the Fort Belknap Indian Reservation where it was again emphasized in the decision of the court that the power of the government to reserve the water and exempt it from appropriation under the state laws is not denied and could not be.

See also *U. S. v. McIntire, et al*, decided by the Circuit Court of Appeals for the Ninth Circuit, 101 *Fed. 2d*. 650, which involved the waters of Mud creek on the Flathead Indian Reservation in Montana.

In *U. S. v. Walker River Irrigation District*, 104 *Fed. 2d*. 334, 336, the court said:

“(3, 4) It is of course well settled that private rights in the waters of non-navigable streams on the public domain are measured by local customs, laws and judicial decisions. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 55 S. Ct. 725, 79 L. Ed. 1356. The act of July 26, 1866, 14 Stat. 251, 253, was no more than a formal confirmation of local law and usage which had therefore met with silent acquiescence on the part of the national government. *Broder v. Natoma Water Co.*, 101 U. S. 274, 276, 25 L. Ed. 790; *California Oregon Power Co. v. Beaver Portland Cement Co.*, supra, 295 U. S. pages 154, 155, 55 S. Ct. 725, 79 L. Ed. 1356. But it does not follow that the government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes.”

The same reasoning is applied in *U. S. v. Big Bend Transit Co.*, 42 *Fed. Supp.* 459, 467.

Under the facts of the instant case there seems to be no question about the title to the land being owned by the United States as an Indian reservation on one side of the river and as part of the public domain on the other side of the river and all of the land having been reserved for water power purposes. Under these circumstances the rights of the federal government to use the land and the water in the stream for development of a hydro-electric project appears to be without question, and that the license granted by the Federal Power Commission premised upon a full investigation and hearing, findings of fact, pursuant to testimony and exhibits, should be upheld by this court.

IV.

THE PETITIONERS HAVE NEITHER A
PRIOR RIGHT NOR ANY RIGHT TO THE
WATERS OF THE DESCHUTES RIVER AT
THE SITE OF THE PELTON PROJECT IN
CONNECTION WITH THEIR SUPERVI-
SION OF FISH

I.

The statutes of Oregon give a preference in the use of water for development of electric energy.

The furnishing of power has been declared a public use and necessity by the statutes of Oregon.

Section 116-415 OCLA

Grande Ronde Electric Co. v. Drake, 46 Or. 243, 245, 78 P. 1031.

Pringle Falls Power Company v. Patterson, 65 Or. 474, 483, 128 P. 820, 132 P. 527.

In re Rogue River, 102 Or. 60, 64, 201 P. 704

Re Waters of Hood River, 114 Or. 112, 186, 227 P. 1065

State v. Beaver Portland Cement Co. 169 Or. 1, 18, 124 P. 2d. 524, 126 P. 2d. 1094.

II.

The granting of water rights to a corporation under regulation has been recognized as devoting water to a public and beneficial use in the development of electric power.

State ex rel N. E. Electric Company v. Superior Court, 28 Wash. 2d. 476, 183 P. 2d. 802, 173 ALR 1351.

State ex rel Washington Water Power, et al v. Superior Court for Grant County, 8 Wash. 2d. 122, 111 P. 2d. 577.

Carstens et al, v. Public Utility Dist. No. 1 of Lincoln County, 8 Wash. 2d. 136, 111 P. 2d. 583.

Arcola Sugar Mills Co. v. Houston Lighting & Power Co., Tex. Civil Appeals, 153 SW 2d. 628, 632.

III.

Section 83-316 OCLA has been repealed by implication and cannot be reconciled with the Hydroelectric Act of Oregon, *Section 119-107 OCLA as amended by Chapter 222, Oregon Laws 1945.*

50 *A. J.* 548, *Section 543.*

50 *A. J.* 565, *Section 564.*

Stricklin v. Geide, 31 *Or.* 373, 376, 49 *P.* 982

Winslow v. Fleischner, 112 *Or.* 23, 26, 228 *P.* 101

Anthony, et al, v. Veatch, et al, 189 *Or.* 462, 481, 220 *P. 2d.* 493

U. S. v. Yuginovich, 256 *US* 450, 41 *S. Ct.* 451, 65 *L. Ed.* 1043.

IV.

An Indian treaty granting to an Indian tribe the exclusive right to all the fish in streams crossing or bordering the reservation is paramount to any rights of the state.

Warm Springs Indian Treaty of June 25, 1855, Statutes at Large, Treaties and Proclamations of the U. S., Vol. XII, page 964.

27 *A. J.* 548, *Sections 10 and 11.*

Tulee v. State of Washington, 315 U. S. 681, 86 L. Ed. 1115.

U. S. v. Winans, 198 US 371, 49 L. Ed. 1089, 1092, 36 C.J.S. page 850, Sec. 18.

Frank Hynes, Regional Director, Fish and Wildlife Service v. Grimes Packing Co., et al, 337 US 86, 93 L. Ed. 1231, 1257.

V.

The petitioners are not aggrieved parties under the Federal Power Act.

USCA Title 16, Section 825 e

U. S. ex rel Chapman v. Federal Power Commission, 191 Fed. 2d. 796, 800.

Interstate Electric Inc. v. Federal Power Commission, 167 Fed, 2d 485

ARGUMENT

Counsel for petitioners has cited the act of Congress of August 18, 1848 creating the Territory of Oregon. We find nothing therein which would prevent the federal government from issuing the license which has been issued by the Federal Power Commission. It is true that

under Article XVIII, Section 7, of the Oregon Constitution, territorial laws in effect were continued in effect until they were altered or repealed. The laws of Oregon have been amended many times with respect to the use of water and also with respect to the regulation of fishing. The Supreme Court of Oregon in *Wright v. Wimberly*, 94 Or. 1, 184, P. 740, definitely decided that the territorial code only continued to be the law of Oregon until the adoption of the Civil Code in 1862.

Portland General Electric Company, as licensee and intervenor herein, takes the position that the petitioners, the Fish Commission of Oregon, and the Oregon State Game Commission, have no legal grounds to complain in this particular matter for the following reasons:

1. That the development of electric power has been declared a public use and necessity by the statutes and supreme court decisions of Oregon.

2. That the granting of such rights to a private corporation under regulation is a public and beneficial use of such water.

3. That the lands upon which the proposed power project would be situated are entirely federal lands and that the federal government has sole jurisdiction over both the land and the water.

4. That the Fish Commission of Oregon has shown

no rights to the use of water at the site of the Pelton Project.

5. That an effort was made to establish a fish refuge by submitting a bill to the legislature of Oregon in 1949, and the legislature refused to establish such fish refuge (R 433,560).

6. That the Federal Power Commission has given full consideration to facilities for preservation of fish, and if necessary, will make final determinations thereof under the terms of the license (R 445,446).

7. The *Section 83-316 OCLA* has been repealed by implication by the subsequent enactment of the Hydroelectric Act of Oregon and the provisions of *Section 119-107 OCLA as amended by Chapter 222, Laws of 1945*, which provides among other things that the Hydroelectric Commission shall take into consideration, in connection with any license, the use of the stream for beneficial purposes, including the propagation of fish.

8. That the treaty between the United States and the Warm Springs Indians dated June 25, 1855 accorded to the Indians the *exclusive* right of taking fish in the streams running through and *bordering* said reservation.

9. That the petitioners are not aggrieved parties under the provisions of the Federal Power Act.

WATER RIGHTS

In order to give the court an understanding of the water rights in the state of Oregon, we will dwell briefly upon some of the statutes and supreme court decisions. As early as 1899 the legislature of Oregon enacted the statute now known as *Section 116-415 OCLA* reading as follows:

“Sec. 116-415. *Use of water to develop mineral resources and furnishing of power as public use and necessity: Right to divert waters: Multnomah falls.* The use of the water of the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and to furnish electrical power for all purposes, is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial use is hereby granted; provided, that the provisions of this act do not apply or extend to that certain stream situated in Multnomah county, Oregon, known as Multnomah creek, and sometimes called Coon creek, which stream forms Multnomah falls, but said stream and the flow of water therein shall not be diverted or interrupted for any purposes whatsoever.”

The early statutes of Oregon provided for appropriation of water rights by the posting of notices at the point of diversion on a stream and the filing of notices or certificates in the office of the County Clerk of the county in which the proposed water right was situated. In 1909 Oregon enacted its water code under which applications were required to be filed with the State Engineer and

continuous use was required to be made of such water in order to protect it. The right to use the water was lost by non-use. Vested rights which were acquired prior to the act of 1909 were continued provided the use of the water continued thereunder.

As a further refinement of the provisions for the appropriation of water, the Hydroelectric Act of Oregon was adopted by the legislature in 1931 and is now embodied in the code of *Section 119-101 OCLA et seq.* Applicable provisions of the Hydroelectric Act are included in the appendix to this brief.

The court will note in the statute, *Section 116-415 OCLA*, above quoted, that the use of water to furnish electrical power for all purposes "is declared to be a public and beneficial use and a public necessity." The following decisions have appropriate definitions therein of public and beneficial use:

Smith v. Cameron, 106 Or. 1, 10, 210 P. 716, 27 ALR 510:

"Section 5777, Or. L., does not pretend to assert that use by a particular individual is itself a public use. And so, too, Section 5789, Or. L., expressly declares that the use of water for mining and electrical power is a public use."

State Ex Rel. N. E. Electric Company v. Superior Court, 28 Wash. 2d. 476, 183P. 2d. 802, 173 ALR 1351:

"The generation and distribution of electric power has long been recognized as a public use by this court. *State ex rel. Washington Water Power Co. vs. Superior Court* (8 Wash. 2d. 122), 11 P. 2d. 577."

State ex. rel. Washington Water Power Co. et al, v. Superior Court for Grant County et al, 8 Wash. 2d. 122, 111 P. 2d. 577:

"The very nature of the business of furnishing electric energy determines that the use to which the condemned property is to be put is a public one. Under our present way of living, electricity is essentially necessary in order to enable our citizens to carry on their every day activities and pursue their accustomed manner of living. *State ex rel. Chelan Electric Co. v. Superior Court*, 142 Wash. 270, 253 P. 115, 58 A.L.R. 779; *Brady v. Tacoma*, 145 Wash. 351, 259, P. 1089, *McCullough v. Interstate Power & Light Co.*, 163 Wash. 147, 300 P. 165; *State ex rel. Willapa Electric Co. v. Superior Court*, *supra*."

Carstens, et al, v. Public Utility Dist. No. 1 of Lincoln County, 8 Wash. 2d. 136, 111 P. 2d. 583:

"The generation and distribution of electric power has long been recognized as a public use by this court. *State ex rel. Washington Water Power Co. v. Superior Court*, Wash., 111 P. 2d. 577."

Arcola Sugar Mills Co. v. Houston Lighting & Power Co., Tex. Civil Appeals, 153 SW 2d. 628, 632:

"(2) The authorities followed in Texas—so cited and relied upon by the appellee, as respectively enumerated *supra*—uphold its several propositions.

Our specified statutes, Article 1302, Sec. 14, Articles 1435, 1436 and 1438, construed together, as they should be, as applicable here, amount to a legislative declaration that appellee's business is to be regarded as being affected with a public use, in consequence of which it is delegated that small portion of the public authority denominated 'the power of eminent domain'; so that, the resulting question, if any, is whether the legislature might reasonably have considered that use a public one, not whether the use itself is actually a public one. 18 Am. Jur. 675, *supra*."

The Supreme Court of Oregon has also upon many occasions again declared that the use of water for furnishing of electrical power is a beneficial and public necessity. These excerpts from decisions of the Supreme Court of Oregon are as follows:

Grand Ronde Electric Co. v. Drake, 46 Or. 243, 245, 78 P. 1031:

"1. The use of water of streams in this State for the purpose of furnishing electrical power for all purposes is declared to be a beneficial and a public necessity, and the right to divert unappropriated water therefrom for such use is granted: B. & C. Comp. Sec. 5022. All corporations having title or possessory right to any land shall be entitled to the use and enjoyment of the water of any stream within the State, to furnish electrical power for any purposes, 'so that such use of the same does not materially affect or impair the rights of prior appropriations': B & C. Comp. Sec. 5023. All such corporations may appropriate and divert such waters, and may condemn rights of way for ditches for carrying the same, and may condemn the rights of riparian pro-

prietors upon the stream from which such appropriation is made, upon compliance with the terms of this act: B. & C. Comp. Sec. 5024."

Pringle Falls Power Co. v. Patterson, 65 Or. 474, 483, 128 P. 820, 132 P. 527:

"The different statutes providing for the appropriation of the water of the lakes and streams of the State of Oregon declare the use thereof, for irrigation and domestic consumption, for the development of the mineral resources of the state, and for furnishing electrical power (Sections 6525, 6551, L. O. L.), to be a public and beneficial use and public necessity, and the right to divert the surplus waters of such lakes and streams for such beneficial purposes is thereby granted.

"In the case of *Grande Ronde Elec. Co. v. Drake*, 46 Or. 243 (78 Pac. 1031), it was held that where plaintiff had complied with the provisions of the statute as to posting notices, etc., it had such a right as would enable it to exercise the right of eminent domain, and obtain a right of way for its ditch or canal."

In re Rogue River, 102 Or. 60, 64, 201 P. 704:

"The use of water of the lakes and the running streams of the State of Oregon for the purpose of developing the mineral resources of the state is declared to be a public and beneficial use and a public necessity, and the right to divert such unappropriated waters for such beneficial use."

In re Waters of Hood River, 114 Or. 112, 186, 227 P. 1065:

"By Section 5789, Or. L., the use of the waters of the state for the purpose of furnishing electrical power for all purposes is declared to be beneficial

use and a public necessity and confers the right to divert unappropriated waters for such beneficial use."

State v. Beaver Portland Cement Co., 169 Or. 1, 18, 124 P. 2d. 524, 126 P. 2d. 1094:

Section 116-415 O.C.L.A., reads in part as follows:

'The use of the water of the lakes and running streams of the state of Oregon for the purpose of developing the mineral resources of the state and to furnish electrical power for all purposes is declared to be a public and beneficial use and a public necessity, and the right to divert unappropriated waters of any such lakes or streams for such public and beneficial use is hereby granted.'

"This part of the section has been unchanged since its enactment in 1899 (Laws 1899, page 172)."

It is to be noted that with the improvement of the art of electric power, it quickly reached the place where it became a public necessity. Originally water power as such was used directly, but by changing it into electric energy, the place of use can be removed from the stream and the extensive use of electric power now has made it a necessity in every home, commercial establishment, and industrial plant. In fact, the whole economy of the country depends to a large extent upon the production of hydroelectric power.

As heretofore pointed out in this brief, the lands on both sides of the Deschutes River at the place of the proposed Pelton Project are owned by the United States

government and were withdrawn from entry and reserved specifically for the development of hydroelectric power although the portion of the record before the Federal Power Commission alluding to such withdrawal was not printed in the record before this court.

On the other hand, neither the Fish Commission of Oregon nor the Oregon State Game Commission make any claim to any water rights of any kind on the Deschutes River which would interfere in any way with the construction, operation and maintenance of the proposed hydroelectric project.

Shortly after this project was proposed in 1949, effort was made by petitioners and others in the 1949 legislative session in Oregon to have the Deschutes River set aside as a fish sanctuary, but the legislature refused to adopt such a statute (R 559, 560). Accordingly, the Federal Power Commission made its findings that the Deschutes River has not been established as a fish refuge by the State of Oregon (R 433).

Implied Repeal of Section 83-316 OCLA

It is contended by the intervenor that the provisions of *Section 83-316 OCLA* cited in petitioners' brief have been repealed by implication and by reason of the subsequent enactment of the Hydroelectric Act of Oregon. . .

Section 83-316 OCLA is reproduced in the appendix

to this brief. It was enacted in 1921. Also reproduced in the appendix as a part of the Hydroelectric Act of Oregon is *Section 119-107 OCLA as amended by Chapter 222, Oregon Laws 1945*. The Hydroelectric Act was adopted in 1931.

The 1921 act made provision for procuring a permit from the Fish Commission of Oregon in certain instances where a dam was about to be constructed of such a height that a fish ladder or fishway thereover was impracticable. The Hydroelectric Act of 1931 and the amendment of 1945 specifically provided that every application under the Hydroelectric Act was subject to protest and remonstrance on behalf of the public or any interested person or persons with respect to other beneficial uses of water, "including the propagation of fish". In other words the Hydroelectric Commission was given the responsibility of making any ultimate determination upon an application in such a manner that all of the uses of water would be taken into consideration, "including the propagation of fish." This subsequent statute is in direct conflict with the authority given under the 1921 act and inasmuch as the two statutes cannot be reconciled, the first statute is repealed by implication. See 50 *A. J.* 548, *Section 543* and 50 *A. J.* 565, *Section 564*. In *Strickland v. Geide*, 31 *Or.* 373, 376, 49 *P.* 982, the court stated:

"It is a rule of law sanctioned by this court that whenever two acts are repugnant, one inimical to the

other, so that both cannot stand, the later will operate as a repeal of the earlier by implication, without any express words of repeal; and such will be the effect, even when they are not repugnant in all their provisions, if the new statute revises the subject-matter of the old, and is plainly intended as a substitute for the old in toto: *Continental Insurance Company v. Rigger*, 31 Or. 336 (48 Pac. 476), and *Little v. Cogswell*, 20 Or. 345 (25 Pac. 727). Such a rule is not inimical to the doctrine that repeals by implication are never favored, nor to that which gives effect to several statutes upon the same subject whenever it is possible to do so; and it is firmly established elsewhere: *Dexter Road Company v. Allen*, 16 Barb. 15; *Roche v. Mayor, etc.* 40 N. J. Law, 257; *Davies v. Fairbairn*, 3 How. 636; *Murdock v. City of Memphis*, 87 U. S. (20 Wall.), 590; *Swann v. Buck*, 40 Miss. 268; *City of Sacramento v. Bird*, 15 Cal. 294; and Endlich's Interpretation of Statutes, Secs. 200, 205."

See also *Winslow v. Fleischner*, 112 Or. 23, 26, 228 P. 101.

In *Anthony, et al v. Veatch, et al*, 189 Or. 462, 481, 220 P. 2d 493, the court said:

"13. 14. It is true that fish wheels and fish scows, the operation of which is prohibited by the act, were already banned long before this act was initiated (Gen. Laws, 1927, Ch. 1), but it is no objection to the validity of an act that it covers subject matter of earlier legislation. If earlier and later statutes are in irreconcilable conflict, then the earlier must yield to the later by implied repeal. *Winslow v. Fleischner*, 112 Or. 23, 228 P. 101, 34 A.L.R. 826, 50 Am. Jur., Statutes, Sec. 543."

See also *U. S. v. Yuginovich*, 256 U. S. 450, 41 S. Ct. 551, 65 L. Ed. 1043.

In the case of *Safe Harbor Water Corporation v. Federal Power Commission*, 124 Fed. 2d. 800, 804, with respect to repeal by implication of a portion of the Federal Power Act, the court stated :

“(1-4) While it is the law that repeals by implication are not looked on with favor, *United States v. Jackson*, 302 U. S. 628, 631, 58 S. Ct. 390, 82 L. Ed. 488, none the less, conflicts and inconsistencies between provisions of acts may necessitate such repeals. The conflict or inconsistency, however, must be plain and irreconcilable. *United States v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *United States v. State of California*, 297, U. S. 175, 56 S. Ct. 421, 80 L. Ed. 567; *H. Rouw Co. v. Crivella*, 8 Cir., 105 F. 2d. 434; *Posadas v. National City Bank*, 296 U. S. 497, 56 S. Ct. 349, 80 L. Ed. 351. In the case at bar the District Court held that the review provisions of of Section 20 and Section 313 (b) presented no indissoluble conflict. But Section 313 (b) provides that the courts of appeals shall have ‘*** exclusive jurisdiction to affirm, modify, or set aside (the) *** order (of the Commission) in whole or in part.’ In *Jackson v. Cravens*, 5 Cir. 238 F. 117, 120, it was said that ‘ *** where a statute provides a new, specific, and complete remedy, and fully covers the subject matter, the provisions of the (later) statute will be looked to alone, and resort will not be had to prior existing general remedies as cumulative.’ In the case at bar since Section 313 (b) does provide a new and specific and complete remedy fully covering the subject matter, we conclude that the review given by the section just cited is ‘exclusive’ and that the review provisions of Section 20 must be deemed to have been repealed by implication.”

RIGHTS TO FISH UNDER INDIAN TREATY

The Warm Springs Indian Reservation was formed pursuant to the Indian Treaty promulgated June 25, 1855, found in the Statutes at Large, Treaties and Proclamations of the United States, Volume XII, page 964. The boundaries of the Warm Springs Indian Reservation are such that for many miles a portion of the Deschutes and Metolius Rivers forms the boundary of the Warm Springs Indian Reservation, including all that portion of the Deschutes River bordering upon the site of the proposed Pelton Project, including the reservoir behind the dam.

The Treaty of June 25, 1855 among other things provides as follows: “ * * * provided also that the *exclusive* right of taking fish in the streams running through and *bordering* said reservation is hereby secured to said Indians,” (Emphasis ours.)

The Indian Treaty in question was entered into prior to the admission of Oregon as a state, but was not ratified by the Senate of the United States as a treaty until after the admission of Oregon into the Union. However, the Oregon Supreme Court has held that such a treaty relates back to the time it was signed even though it was subsequently ratified by the Senate. *Anthony V. Veatch*, 189 Or. 462, 485, 220 P. 2d. 493, 221 P. 2d 575.

There seems to be no question of the right of the

United States to make such a treaty. 42 CJS, page 681, Section 24. In the construction of treaties, it is found that they are liberally construed by the courts in favor of the Indians and not according to the technical meaning which lawyers might place upon words in such a treaty, but rather in the sense in which such words would be naturally understood by the Indians. 42 CJS 684, Section 25 (b); 27 AJ 548, Sections 10 and 11. Reference to the treaty was made in the record of this case. (R 543 to 546, incl.)

On several occasions the courts have construed treaties with the Indians relative to fishing rights. In *Tulee v. State of Washington*, 315 US 681, 86 L. Ed. 1115, the court was called upon to construe a treaty with the Yakima Tribe relative to fishing rights. The State of Washington attempted to regulate fishing by the Indians outside of the Indian reservation. The court held that the State was precluded under the provisions of the Indian treaty from attempting to collect any kind of fees from the Indians even though they were fishing outside the reservation. With respect to the general rule of construing a treaty, the court said:

“In determining the scope of the reserved rights of hunting and fishing, we must not give the treaty the narrowest construction it will bear. In *United States v. Winans*, 198 US 371, 49 L. ed. 1089, 25 S Ct 662, this Court held that, despite the phrase ‘in common with citizens of the territory,’ Article 3 con-

ferred upon the Yakimas continuing rights, beyond those which other citizens may enjoy, to fish at their 'usual and accustomed places' in the ceded area; and in *Seufert Bros. Co. v. United States* 249 US 194, 63 L ed 555, 39 S Ct 203, a similar conclusion was reached even with respect to places outside the ceded area. From the report set out in the record before us of the proceedings in the long council at which the treaty agreement was reached, we are impressed by the strong desire the Indians had to retain the right to hunt and fish in accordance with the immemorial customs of their tribes. It is our responsibility to see that the terms of the treaty are carried out, so far as possible, in accordance with the meaning they were understood to have by the tribal representatives at the council and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people. *United States v. Kagama*, 118 US 375, 384, 30 L ed 228, 231, 6 S Ct. 1109; *Seufert Bros. Co. v. United States*, *supra* (249 US 198, 199, 63 L ed 558, 559, 39 S Ct 203)."

In *United States v. Winans*, 198 US 371, 49 L. Ed. 1089, 1092, the United States Supreme Court gave a well-considered opinion with respect to the interpretation of an Indian treaty determining that the fishing rights referred to in the treaty with the Yakima nation in the State of Washington entered into at approximately the same time as the treaty with the tribes of middle Oregon holding the treaty was not a grant of rights to the Indians, but was a grant of rights from the Indians to the United States, and the fishing rights were in the nature of a reservation of rights by the Indians. In its opinion the Court said:

“The right to resort to the fishing places in controversy was a part of larger rights possessed by the Indians, upon the exercise of which there was not a shadow of impediment, and which were not much less necessary to the existence of the Indians than the atmosphere they breathed. New conditions came into existence, to which those rights had to be accommodated. Only a limitation of them, however, was necessary and intended, not a taking away. In other words, the treaty was not a grant of rights to the Indians, but a grant of rights from them—a reservation of those not granted. And the form of the instrument and its language was adapted to that purpose. Reservations were not of particular parcels of land, and could not be expressed in deeds, as dealings between private individuals. The reservations were in large areas of territory, and the negotiations were with the tribe. They reserved rights, however, to every individual Indian, as though named therein. They imposed a servitude upon every piece of land as though described therein. There was an exclusive right of fishing reserved within certain boundaries. There was a right outside of those boundaries reserved ‘in common with citizens of the territory.’ As a mere right, it was not exclusive in the Indians. Citizens might share it, but the Indians were secured in its enjoyment by a special provision of means for its exercise. They were given ‘the right of taking fish at all usual and accustomed places’, and the right ‘of erecting temporary buildings for curing them.’ The contingency of the future ownership of the lands, therefore, was foreseen and provided for; in other words, the Indians were given a right in the land,—the right of crossing it to the river,—the right to occupy it to the extent and for the purpose mentioned. No other conclusion would give effect to the treaty. And the right was intended to be continuing against the United States and its grantees as well as against the state and its grantees.”

36 C.J.S., *page* 850, *Sec.* 18, with respect to Indians' rights of fishery gives the general law with the same thought and also observed that such treaties are not subordinate to the powers acquired by a state in and over the water in question. The text reads as follows:

"Where a treaty with the Indians gives them the right to fish on their reservation, *the state laws relating to fishing do not apply to them*; and, under some statutes, Indians are expressly exempted from the operation of the statute. Where, however, the Indian reservation has been included within the limits of a state formed since the treaty, without reserving the rights of the Indians, such laws may be enforced against them. *Treaties with Indians reserving in them the right of fishery will be construed according to their natural meaning and the Indians' understanding thereof.* A treaty with a tribe of Indians which secures to them the right of taking fish 'at usual and accustomed places in common with the citizens' of the territory reserves to them the right to fish outside of the boundaries of the lands ceded by them by the treaty; but such treaties, or treaties with somewhat similar terms, do not give to the Indians any exclusive or special privilege outside of their reservation, but only such rights as may be enjoyed by all citizens in common, and state laws abridging the fishing rights of citizens are equally effective as against the Indians. The Indians' rights under such treaties *are not subordinate to the power acquired by a state in and over the waters in question on its being admitted to the Union as a state*; nor can such rights be taken from the Indians by grants to private persons, by the United States or a state." (Emphasis ours.)

In applying this law of interpretation to the provisions

of the treaty with the Central Oregon tribes, it is only necessary to give a simple interpretation of that portion of the treaty above quoted which gave the Indians the "exclusive right of taking fish in the streams running through and bordering said reservation." The word "exclusive" can only have one ordinary meaning in the minds of the Indians, and that would be to the effect that the Indians and no others have the right of taking fish in such streams. The treaty was not limited to any kind of fish nor was it limited to streams merely running through the reservation, but included streams "bordering said reservation". The term "exclusive" has been interpreted by the United States Supreme Court in its ordinary sense. In *Frank Hynes, Regional Director, Fish and Wildlife Service, Department of the Interior, v. Grimes Packing Co., et al*, 337 US 86, 93 L. Ed. 1231, 1257, the Supreme Court of the United States considered an act of Congress which prohibited the granting of an "exclusive" right of fishery and determined that this would forbid not only a grant to a single person or corporation, but to any special group or number of people. The word "exclusive" in the Indian treaty would therefore mean that not only individuals were prohibited from the right of fishery in the Deschutes River, but also all other groups, including the State of Oregon, the Oregon State Game Commission, and the Fish Commission of Oregon. In view of the liberal interpretation given to

Indian treaties and the construction thereof in favor of the Indian tribes, it could well be argued that the exclusive right to take the fish on all streams bordering said reservation would include all fish from the source of the Deschutes and its tributaries to the mouth thereof. Giving consideration to the habits, customs and necessities of the Indians at the time of entering into the treaty in which the right of fishery was a matter of subsistence, and the usual habits of the Indians to fish the entire stream, such an interpretation would not be illogical. However, there would seem to be no question whatsoever as to that portion of the Metolius and Deschutes Rivers constituting boundaries of the reservation which would form a fish sanctuary for the benefits of the Indians and their exclusive use, and would exclude any rights whatsoever of the Fish Commission of Oregon under any statutes which the Legislature might enact. For these reasons the provisions of Section 83-316, *Oregon Compiled Laws Annotated* should have no deterring effect whatsoever upon the construction of a dam and powerhouse on the Deschutes River adjacent to the Warm Springs Indian Reservation.

Petitioners Not Aggrieved Parties

Petitioners are not aggrieved parties under the Federal Power Act. Under the provisions of *Title 16, Section 825 l USCA*, only a party aggrieved by an order of

the Commission may obtain a review of such order in the Circuit Court of Appeals. In this case the record is entirely devoid of any evidence whatsoever that the Fish Commission of Oregon or the Oregon State Game Commission claim any rights to water, land, or fish at the location of the proposed project. The record does show that they do not even have any right to the fish in view of the Indian treaty above referred to.

In the case of *U. S. ex rel Chapman v. Federal Power Commission*, 191 *Fed. 2d.* 796, 800, the Secretary of the Interior and a co-operative association petitioned for the review of an order of the Federal Power Commission granting a license to the Virginia Electric and Power Company to construct a dam at Roanoke Rapids, North Carolina. The court held that the petitioners were not parties aggrieved under the above statute. In its opinion, the court said:

“(5) For the reasons stated, we are of the opinion that petitioners are not parties aggrieved within the meaning of the statute and consequently have no standing in court to ask that the order of the Commission be reviewed or set aside. Assuming, however, that they have made a case entitling them to relief, since we are of the opinion, for reasons which we shall not examine, that the granting of the license here in question was within the Commission’s power and that there is no basis for holding that the discretion vested in it by law was not properly exercised.”

Also in the case of *Interstate Electric, Inc. v. Federal*

Power Commission, 164 *Fed. 2d.* 485, the court held that the Interstate Electric, Inc., the State Public Utility Commissioners Association, and the State Grange were not parties aggrieved by an order of the Federal Power Commission.

We respectfully submit that the petitioners have established no rights under which they can take an appeal from an order of the Federal Power Commission.

V.

FEDERAL AUTHORITY IS PARAMOUNT TO THAT OF A STATE IN ALL MATTERS WHERE THE UNITED STATES HAS JURISDICTION

Many authorities heretofore given in this brief point out the authority of the federal government in the present instance. However, it has been decided by the United States Supreme Court that when there is a conflict between the rights of the federal government and state commissions or state statutes with respect to a federal power license over which the Federal Power Commission has jurisdiction, then such conflict is resolved in favor of the federal government. In *First Iowa Hydroelectric Co-operative v. Federal Power Commission, State of Iowa Intervenor*, 328 *US* 152, 90 *L. Ed.* 1143, the state of Iowa invoked a state statute which required that "the method

of construction, operation, maintenance and equipment of any and all dams in such waters shall be subject to the approval of the executive council". In its opinion the court stated:

"To require the petitioner to secure the actual grant to it of a State permit under section 7767 as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project. Such a veto power easily could destroy the effectiveness of the federal act. It would subordinate to the control of the State the 'comprehensive' planning which the Act provides shall depend upon the judgment of the Federal Power Commission or other representatives of the Federal Government."

and also in 90 L. Ed., page 1151, as follows:

"In those sections the Act places the responsibility squarely upon federal officials and usually upon the Federal Power Commission. A dual final authority, with a duplicate system of state permits and federal licenses required for each project, would be unworkable. 'Compliance with the requirements' of such a duplicated system of licensing would be nearly as bad. Conformity to both standards would be impossible in some cases and probably difficult in most of them. The solution adopted by Congress, as to what evidence an applicant for a federal license should submit to the Federal Power Commission, appears in section 9 of its Act. It contains not only subsection (b) but also subsections (a) and (c). Section 9(c) permits the Commission to secure from the applicant 'Such additional information as the commission may require.' This enables it to secure, *in so far as it deems it material*, such parts or all of the information that the respective states may have pre-

scribed in state statutes as a basis for state action. The entire administrative procedure required as to the present application for a license is described in section 9 and in the Rules of Practice and Regulations of the Commission.

“The securing of an Iowa state permit is not in any sense a condition precedent or an administrative procedure that must be exhausted before securing a federal license. It is a procedure required by the State of Iowa in dealing with its local streams and also with the waters of the United States within that State in the absence of an assumption of jurisdiction by the United States over the navigability of its waters. Now that the Federal Government has taken jurisdiction of such waters under the Federal Power Act, it has not by statute or regulation added to the state requirements to its federal requirements.”

Subsequent proceedings in the federal court, *State of Iowa v. Federal Power Commission*, 178, *Fed. 2d.* 421, gives the history of the United States Supreme Court case above referred to. On page 426 the court stated:

“We think that the decision of the Supreme Court in the First Iowa Hydro-Electric Cooperative case, 328, U. S. 152, 66 S. Ct. 906, 90 L. Ed. 1143, disposes of this contention. As we read that opinion, it holds that section 9(b) of the Act does not require the Commission to compel the applicant to produce evidence that it has complied with all of the applicable laws of Iowa before a license may be granted. Speaking of section 9(b) of the Act, The Supreme Court said at page 177 of 328 U. S., at page 918 of 66 S. Ct.: ‘It (section 9(b)) does not itself require compliance with any state laws. Its reference to state laws is by way of suggestion to the Federal Power Commission of subjects as to which the Commission may wish

some proof submitted to it of the applicant's progress. The evidence required is described merely as that which shall be "satisfactory" to the Commission. The need for compliance with applicable state laws, if any, arises not from this federal statute but from the effectiveness of the state statutes themselves.'

"The Court also said at page 181 of 328 U. S., at page 920 of 66 S. Ct.: 'The detailed provisions of the Act providing for the federal plan of regulation leave no room or need for conflicting state controls.

"We gather from the opinion of the Supreme Court that, while the Federal Power Commission may properly concern itself with the question whether an applicant for a license can comply with applicable state laws, if any, relating to the proposed project and the business in which the applicant proposes to engage, the Commission is not compelled to do so, but may license the project and let the licensee take his chances of being able to comply with the applicable state laws, or such of them as have not been superseded by the Federal Power Act. We think that the challenged orders of the Commission may not be invalidated by this Court because of the asserted noncompliance by the Commission with section 9(b) of the Act."

This court will also note on page 428 of the opinion last above referred to that the court pointed out "the defects, if any, in the commission's proceedings relative to the protection of wildlife resources could not, in our opinion, be regarded as sufficiently vital or prejudicial to justify a vacation of the orders under review."

Petition for writ of certiorari was filed with the United States Supreme Court from the above decision

and was denied, 339 US 979, 94 L. Ed. 1383.

In petitioners' brief attempt is made to distinguish the First Iowa Hydroelectric case by reason of the finding of the Federal Power Commission that the Cedar River in Iowa was navigable. Whether or not the Deschutes River might be considered navigable if the Federal Power Commission takes jurisdiction over the site of the Pelton Project by reason of ownership of land, the reasoning of the First Iowa Hydroelectric case would have to be applied thereto by reason of the sovereignty of the United States. In fact on page 42 of petitioner's brief, the theory of navigation as set forth in the Appalachian Power case was practically admitted by the petitioners. In referring to the First Iowa Hydroelectric case, they asserted that the Supreme Court took jurisdiction because the flow of the Cedar River would substantially affect the flow and navigable capacity of Iowa River, and that the operation of such a project would cause fluctuation in the flow and navigable capacity in the Mississippi River.

The paramount jurisdiction of the United States over such water was also emphasized in *United States v. California*, 332 US 19, 91 L. Ed. 1889.

We respectfully submit that in this instance the United States government has paramount jurisdiction over the water of the Deschutes River, not only by reason of the fact that it is a direct tributary of the navigable Columbia

River, but also by reason of the ownership of lands on both sides of the river that would be affected by the construction of the Pelton Project.

CONCLUSION

The simple facts of this case show that the intervenor, Portland General Electric Company, was required to make application to the Federal Power Commission for a license under the provisions of the Federal Power Act. The Deschutes River is an immediate tributary of the Columbia River and within the definition of navigable waters as contemplated by the Federal Power Act and as announced by the United States Supreme Court. The lands on both sides of the river at the site of the proposed Pelton Project are owned by the United States government. On any questions of fact for determination, the entire record of the Federal Power Commission has not been brought before the court, and its findings on such questions of fact would necessarily be final.

Under these facts and the statutes and decisions herein cited, the jurisdiction of the United States over both the land and the waters cannot be denied.

The only remaining question that could be interposed by the petitioners would be that which pertains to the protection of any state rights in the granting of a license. The provisions of the Federal Power Act are sufficiently

broad to give protection to any and all uses of water, including adequate protection for preservation and propagation of fish. The terms of the license indicate that not only a full and fair hearing was had on the facts, but that the Federal Power Commission was making every effort to protect all uses of water in the area in an effort to coordinate the use of the water for hydroelectric purposes with that of other uses, such as domestic water supply, municipal use, irrigation and facilities for fish, as well as looking to the best interests of the Indian tribe as to the use of their property.

The petitioners, Fish Commission of Oregon and the Oregon State Game Commission, have shown no rights whatsoever with respect to the use of such waters, and the Federal Power Commission made its determination that fish life in the stream could be preserved and possibly enhanced. In any event, under the provisions of the Indian treaty, the State of Oregon had no jurisdiction whatsoever over fish in the stream, and the petitioners are not aggrieved parties entitled to a review within the provisions of the Federal Power Act.

Finally, it is recognized that only confusion would result from having different governmental agencies attempting to make final determinations in cases of this character. Either the federal government is sovereign in its power or that sovereignty rests in the state. Under the numerous

decisions given herein, we do not believe that this court can come to any other conclusion than that the United States has the sovereign right with respect to the issuance of a license on the Pelton Project for the use of government lands and water over which they do and should maintain sovereign control.

We respectfully submit that the order of the Federal Power Commission granting a license to Portland General Electric Company should be affirmed and the petition for writ of review dismissed.

Respectfully submitted,

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APPENDIX*Section 83-316. OCLA*

“Sec. 83-316 OCLA. Dams to be provided with hatchery when: (Permit: Conveyance of necessary land: Operation of hatchery: Bond: Dams heretofore constructed). In the event that any person desires to construct a dam in any of the streams of this state to a height that will make a fish ladder or fishway thereover impracticable, in the opinion of the commission, then such person may make an application to the commission for a permit to construct such dam, and the commission is hereby authorized to grant such permit in its discretion, upon the condition that the person so applying for such permit shall convey to the state of Oregon a site of the size and dimensions satisfactory to the commission, at such place as may be selected by the commission, and erect thereon a hatchery and hatchery residence, according to plans and specifications to be furnished by the commission, and enter into an agreement with the commission, secured by a good and sufficient bond, to furnish all water and light, without expense, to operate said proposed hatchery; and no permit for the construction of any such dam shall be given by the commission until the person applying for such permit shall have actually conveyed said land to the state and erected said hatchery and hatchery residence in accordance with the said plans and specifications. The provisions of this section shall not apply to cases where dams have been heretofore constructed in streams to a height where the construction of a fish ladder is impracticable, provided an agreement has been entered into and executed with reference to the construction and maintenance of such dam between the commission and the owners thereof. (L. 1921, ch. 105, Sec. 49, p. 156; O. C. 1930, Sec. 40-217).”

Section 119-107 OCLA as amended by Chapter 222, Oregon Laws, 1945.

“Section 1. That section 119-107, O.C.L.A., be and the same hereby is amended so as to read as follows:

Sec. 119-107. A preliminary permit may be issued by the commission to any person, persons, associations or private corporations, possessing the qualifications of a licensee as hereinbefore specified. The application for a preliminary permit shall set forth the name and postoffice address of the applicant, the approximate site of any proposed dam or diversion, the amount of water in cubic feet per second, the theoretical horsepower and such other data as the commission may be (by) regulation or order prescribe. Upon receipt of an application for a preliminary permit it shall be the duty of the state engineer, as ex officio secretary of the commission, to make an endorsement thereon of the date of receipt and to keep a record thereof, which date so endorsed shall determine the priority of the use of water initiated under the provisions of this act. At the time of filing the application for a preliminary permit the applicant shall pay to the state of Oregon the minimum sum of \$50, and such further sum, not exceeding \$200, as shall be determined by the commission, to cover costs of recording publishing notice and making such investigation as may be necessary to determine whether or not a preliminary permit should be granted. If the commission shall conclude to grant a preliminary permit the applicant shall pay to the state of Oregon, at the time such preliminary permit is issued, and in addition to the sums hereinbefore specified, the sum of 5 cents for each theoretical horsepower as computed by the commission and covered by the permit. Whenever an application is made for a preliminary permit the commission shall give written notice of the filing of such application to any municipality or other person or corporation which, in the judgment of the commission, is likely to be interested in or affected thereby, and shall also publish notice of such application once each week for at least four consecutive weeks and for such further time, if any, as the

commission shall determine, in a newspaper published in the county in which the project covered by the application is located, and if in more than one county, then in a newspaper published in each county; provided, however, that no application for the appropriation or use of water for the development of 1,000 theoretical horsepower or more shall be granted until the expiration of at least six months after the application for a preliminary permit therefor has been filed with the commission. The commission shall, by order or regulation, provide for the time and manner of hearings upon such application. Every application for the appropriation of water for the generation of electricity subject to the terms of this act shall be subject to protest or remonstrance on behalf of the public or any district organized for public purposes, or any interested private person or persons, on the ground that the proposed construction, development or improvement would damage or destroy the use or utility of the stream or other body of water involved for other beneficial purposes, including the propagation of fish, scenic, esthetic, recreational, park, highway or other beneficial use. All such protests and remonstrances must be filed with the commission within the time specified in the notice and must be in writing and verified by the parties so protesting. A certified copy thereof shall be served upon the applicant for the permit; provided, that in the discretion of the commission at the time of the hearing any interested party may make an oral protest if there exists any good reason therefor and the commission shall allow the applicant to be heard in opposition thereto. Every protest or remonstrance which is not filed and served as herein required shall be deemed waived. The purpose for which a preliminary permit may be issued is to enable the applicant to make necessary examinations, surveys, and prepare maps, plans, specifications and cost estimates of any proposed project and to make such other preparation as may be necessary to carry forward the work if a license is issued therefor."

No. 13345

UNITED STATES
COURT OF APPEALS
for the Ninth Circuit

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION,

Petitioners,

vs.

FEDERAL POWER COMMISSION,

Respondent.

PORTLAND GENERAL ELECTRIC COMPANY,

Intervenor.

*Petition for Review to Set Aside Order
of the Federal Power Commission*

BRIEF OF INTERVENOR PORTLAND GENERAL ELECTRIC COMPANY IN ANSWER TO BRIEF AMICUS CURIAE OF THE OREGON DIVISION OF THE IZAAK WALTON LEAGUE OF AMERICA, INC.

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FILED

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UNITED STATES
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OPENING STATEMENT

This brief is made only in reply to the brief filed amicus curiae by the Oregon Division of the Izaak Walton League of America, Inc.

The only points raised in the brief of the Oregon Division of the Izaak Walton League of America, Inc. are those pertaining to factual questions and whether or not the Federal Power Commission had before it substantial evidence upon which to make its findings referred to in the brief *amicus curiae*.

POINTS AND AUTHORITIES

The court does not substitute its judgment for that of an administrative agency and a finding of fact by the administrative agency is conclusive.

42 A. J. 632, et seq. Section 211

42 A. J. 645, Section 217

42 A. J. 680, Section 240

In order for an appellate court to make any determination of factual matters, it is required for the court to have before it all of the evidence upon the subject which had been submitted to the administrative body.

42 A. J. 674, Section 235.

Mississippi Valley Barge Line Company, v. U. S.
292 U. S. 282, 78 L. Ed. 1260, 1264

Court of appeals may not retry a controversy or substitute its judgment for that of the Federal Power Commission as to any doubtful or debatable questions of fact.

State of Iowa v. Federal Power Commission, 178 Fed. 2d. 421, certiorari denied, U. S. Sup. Ct. 339 U. S. 979, 94 L. Ed. 1383.

Safe Harbor Water Corporation v. Federal Power Commission, 179 F. 2d. 179, 199. Certiorari denied by U. S. Sup. Ct., 339 U. S. 957, 70 S. Ct. 980, 94 L. Ed. 1368.

Federal Power Commission v. Idaho Power Company, ——US——, 97 L. Ed. (Advance Sheets p. 9)

The Oregon Division of the Izaak Walton League of America, Inc. is not an aggrieved party under the provisions of the Federal Power Act.

USCA Title 16, Section 825 l

U. S. ex rel Chapman v. Federal Power Commission, 191 Fed. 2d. 796

Interstate Electric Inc. v. Federal Power Commission, 164 Fed. 2d. 485.

ARGUMENT

All Evidence Must Be Brought Before The Court on Questions of Fact

The brief of the Fish Commission of Oregon and the Oregon State Game Commission does not attempt to argue all of the assignments of error raised by it before the Federal Power Commission. The brief amicus curiae filed on behalf of the Oregon Division of the Izaak Walton League of America, Inc. appears to cover those assignments of error not covered by the brief of the Fish Commission of Oregon and the Oregon State Game Commission.

The assignments of error alluded to in the brief of the Oregon Division of the Izaak Walton League of America, Inc. all pertain to findings of fact made by the Federal Power Commission, some of which pertain to fish in the Deschutes River and others pertain to the costs of fish facilities as determined by the Federal Power Commission and the shortage of power in the area served by the Portland General Electric Company, the licensee under the order of the Federal Power Commission.

The petitioners, the Fish Commission of Oregon and the Oregon State Game Commission have not seen fit to bring before the court the entire record of testimony and evidence, and therefore this court is hardly in a

position to make any determination as to the quality or quantity of evidence which was considered by the Federal Power Commission.

The court will observe from reading the record that the printer indicates the paging of the transcript before the Federal Power Commission on those portions of the record which were printed for the benefit of this court and that many gaps in the paging appear in the record before this court.

On the questions of fish, the testimony is not included of such witnesses as Ralph P. Cowgill, W. J. Smith, B. L. McKay, L. Bates, Robert L. Ring, Howard Turner. With respect to the power shortage in the area, the testimony is not included in the record of such witnesses as Marion E. Cady, W. L. Vinson, James K. Marr, Arthur Porter, Waldemar Seton, Thos. W. Delzell, Almon D. Thomas, Dr. Joseph J. A. Jessel. With respect to the costs of operation of the proposed project and the amount of electric energy to be produced therefrom, the record does not show the testimony of Arthur Porter, an engineer, W. E. Enns, an engineer, A. G. Sunda, an engineer of the Federal Power Commission, Almon D. Thomas, an electrical engineer of the Federal Power Commission and Dr. Joseph J. A. Jessel, an electrical engineer of the Federal Power Commission.

The testimony of some of the witnesses whose testimony is reported in the printed record only shows a part thereof and is not the complete testimony of such witnesses.

As an example of how this deficiency in the record leaves the court without all the necessary information, including the writer of the brief *amicus curiae*, let us take Point I under the argument shown on page 4 of the brief *amicus curiae* where it is claimed that there is no substantial evidence in the record to support the finding as to the annual cost to the licensee of fish conservation facilities in the amount of \$795,000.

The staff of the Commission and the engineer of the applicant presented testimony as to certain costs of operation. Exhibits numbered 26 and 28 before the Federal Power Commission dwell upon these costs. The staff of the Federal Power Commission estimated the annual cost of fishery facilities as follows:

| | |
|--|---------------------|
| Annual cost of money, depreciation, and taxes on an investment of \$4,430,- 000 (the reregulating dam) | \$ 410,000.00 |
| Annual cost of operation and mainten- ance cost of the reregulating dam | 10,000.00 |
| Annual operation and maintenance cost of the fish propagation facilities | 255,000.00 |
| Total estimated annual cost | <hr/> \$ 675,000.00 |

However, the examiner of the Federal Power Commission who heard the evidence and made a recommended decision (R. 351) revised the item of annual operation and maintenance cost of the fish propagation facilities from \$255,000 to \$325,000, and an additional allowance of \$40,000 for an egg taking station bringing the figure to \$375,000, or a total of \$795,000 as the annual cost to the applicant of fish conservation facilities.

With respect to the argument on Point II, page 5 of the brief *amicus curiae*, the values attributable to the project and the amount that such values would exceed the costs and losses associated therewith were all outlined by the witnesses who gave testimony as to costs and power values such as Arthur Porter, Waldemar Seton, Thos. W. Delzell, A. G. Sunda, Almon D. Thomas, and Dr. Joseph J. A. Jessel, none of whose testimony is included in the record.

Each argument and point could be thus treated, but in view of the authorities cited herein, we feel it is unnecessary to go through each point in the brief *amicus curiae*.

It appears that a material part of the record has not been printed if the petitioner desired to pursue the assignments of error premised upon the findings of fact of the Commission. Under rule 19 of this court, this would ordinarily be ground for dismissal of the appeal.

However, the factual matters are argued principally in the brief amicus curiae, and it is assumed that the most this court could do would be to either strike the brief amicus curiae from the record, or ignore the same in its determination.

In order for an appellate court to make a determination of a factual matter, it is necessary that the court have before it all of the evidence upon the subject which has been submitted. 42 *A. J.* 674, *Section* 235. See also *Mississippi Valley Barge Line Company v. U. S.*, 292, *US* 282, 78 *L. Ed.* 1260, 1264, where the court said:

“The settled rule is that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made. *Apiller v. Atchison, T. & S. F. R. Co.* 253 *U. S.* 117, 125, 64 *L. ed.* 810, 817, 40 *S. Ct.* 466; *Louisiana & P.B.R. Co. v. United States*, 257 *U. S.* 114, 116, 66 *L. ed.* 156, 158, 42 *S. Ct.* 25; *Nashville C. & St. L. R. Co. v. Tennessee*, 262 *U. S.* 318, 324, 67 *L. Ed.* 999, 1003, 43 *S. Ct.* 583; *Edward Hines Yellow Pine Trustees v. United States*, 263 *U. S.* 143, 148, 68 *L. ed.* 216, 220, 44 *S. Ct.* 72; *Chicago, I. & L. R. Co. v. United States*, 270 *U. S.* 287, 295, 70 *L. ed.* 590, 595, 46 *S. Ct.* 226. The appellant did not free itself of this restriction by submitting additional evidence in the form of affidavits by its officers. For all that we can know, the evidence received by the Commission overbore these affidavits or stripped them of significance.

The Court Does Not Substitute Its Judgment for That of An Administrative Agency.

It is fundamental law that an appellate court does not attempt to substitute its own views as to facts which are found by an administrative authority. 42 *A. J.* 632, *Section* 211; 42 *A. J.* 645, *Section* 217. A presumption is in favor of the administrative agency and the burden of proving otherwise is upon the party complaining. 42 *A. J.* 680, *Section* 240.

This same reasoning has been held specifically with respect to findings of the Federal Power Commission. In *State of Iowa v. Federal Power Commission*, 178 *Fed.* 2d. 421, the court said:

“(4) While we may entertain the same views as those expressed by the Federal Power Commission in the Gasconade case and by the Trial Examiner, the Chairman of the Commission, and the State of Iowa in this case with respect to the economic feasibility of the project and the soundness of the proposed plan of financing its construction, that would not, in our opinion, give us the right to vacate the orders of the Commission granting the license. If this license has been improvidently granted, as the State of Iowa insists, whatever stigma may subsequently attach to its issuance or to the execution of the questionable plan for financing the cost of the project will have to be borne by the Commission alone. It is to be remembered that, within the limits of the jurisdiction conferred upon it, the power of a court or an administrative agency to decide questions is not confined to deciding them correctly. *Pittsburgh Plate Glass Co. v. National Labor Re-*

lations Board, 8 Cir., 113 F. 2d 698, 701, affirmed 313 U. S. 146, 61 S. Ct. 908, 85 L. Ed. 1251."

Certiorari was denied in the above case by the United States Supreme Court, 339 U. S. 979, 94 L. Ed. 1383.

In *Safe Harbor Water Corporation v. Federal Power Commission*, 179 F. 2d. 179, 199, the court pointed out that such issues of fact lie distinctly within the province of the Commission, and that the court may not try such issues. In this case certiorari was denied by the United States Supreme Court, 339 U. S. 957, 70 S. Ct. 980, 94 L. Ed. 1368.

Also in the recent case of *Federal Power Commission v. Idaho Power Company* —US—, 97 L. Ed. (*Advance Sheets*, page 9, 11), where the court said:

"The Court, it is true, has power 'to affirm, modify, or set aside' the order of the Commission 'in whole or in part'. Sec. 313 (b), 16 USC Sec. 8251 (b). But that authority is not power to exercise an essentially administrative function. See *Ford Motor Co. v. National Labor Relations Board*, 305 US 364, 373, 374, 83 L ed 221, 229, 230, 59 S Ct 301; *Jacob Siegel Co. v. Federal Trade Com.* 327 US 608, 90 L ed 888, 66 S Ct 758. The nature of the determination is emphasized by Sec. 10 (a) which specifies that the project adopted 'shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan . . . for the improvement and utilization of water power development, and for other beneficial public uses.' Whether that objective may be achieved if the contested conditions are stricken from the order is an administrative, not a judicial, decision."

The Oregon Division of the Izaak Walton League of America, Inc., Is Not An Aggrieved Party

Although the Oregon Division of the Izaak Walton League made an appearance in the proceeding before the Federal Power Commission, it is not an aggrieved party within the purview of the Federal Power Act. Under the provisions of *Title 16, Section 825 l USCA*, only a party aggrieved by an order issued by the Commission may obtain a review of such order in the Circuit Court of Appeals. The Oregon Division of the Izaak Walton League of America, Inc. has not shown either in the record before this court, or before the Federal Power Commission, where or how it would be aggrieved by the construction of a project under the license issued by the Federal Power Commission. It has no particular interest either in the water or fish in the Deschutes River, or any ownership or proprietorship thereto, nor any interest in the lands bordering upon said river.

The case of *U. S. ex rel Chapman v. Federal Power Commission*, 191 *Fed 2d*. 796,800, the Secretary of the Interior and a cooperative association petitioned for the review of an order of the Federal Power Commission granting a license to the Virginia Electric and Power Company to construct a dam at Roanoke Rapids, North Carolina. The court held that the petitioners were not

parties aggrieved under the above statute. In its opinion, the court said:

“(5) For the reasons stated, we are of the opinion that petitioners are not parties aggrieved within the meaning of the statute and consequently have no standing in court to ask that the order of the Commission be reviewed or set aside. Assuming, however, that they have made a case entitling them to relief, since we are of opinion, for reasons which we shall not examine, that the granting of the license here in question was within the Commission’s power and that there is no basis for holding that the discretion vested in it by law was not properly exercised.”

Also in the case of *Interstate Electric, Inc. v. Federal Power Commission*, 167 Fed. 2d. 485, the court held that the Interstate Electric, Inc., the State Public Utility Commissioners Association, and the State Grange were not parties aggrieved by an order of the Federal Power Commission.

CONCLUSION

In view of the fact that the entire record has not been brought to this court and the further fact that the findings of the Federal Power Commission, are conclusive in any event, and that the Oregon Division of the Izaak Walton League of America, Inc. is not an aggrieved party, we respectfully submit that this court should either strike the brief of the Oregon Division of the Izaak Walton

League of America, Inc. from the files herein, or entirely ignore the same.

Respectfully submitted,

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Federal Power Commission.*

PETITIONERS' REPLY BRIEF

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Federal Power Commission.*

PETITIONERS' REPLY BRIEF

MAY IT PLEASE THE COURT:

THE FAILURE OF PORTLAND GENERAL
ELECTRIC COMPANY TO SECURE STATE AP-
PROVAL FOR THE PELTON DAM IS AN ABSO-
LUTE BAR UNDER SECTION 9 (b) OF THE FED-
ERAL POWER ACT TO ISSUANCE OF A LICENSE
FOR THE PROJECT.

Respondent and the Intervenor argue that the legislative history of the Federal Power Act and the provisions of the Act demonstrate conclusively that the Commission's license for the project is valid, notwithstanding the inability of the Company to comply with the laws of Oregon which Petitioners' claim are applicable. In this connection Respondent states (Brief pp. 17-19):

"Prior to 1920, when the Federal Water Power Act was enacted, water-power projects on lands of the United States could be constructed and operated pursuant to the Act of February 15, 1901 (31 Stat. 79). The 1901 Act related not only to land use but to water use as well, and permission could not be given except upon a finding by the proper official that the proposed development would not be incompatible with the public interest.

"The Federal Water Power Act of June 10, 1920, combined in one agency the control of water-power developments which had previously been exercised through the Departments of the Interior and Agriculture on lands of the United States and through the War Department on navigable waters. House Report No. 61, 66th Cong., 1st sess., dated June 24, 1919, stated that the purpose of the Power Act was to provide 'a method whereby the water powers of the country, wherever located, can be developed by a public or private agency under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest.' The efforts of

the Commission were to be 'directed toward a constructive national program of intelligent, economical utilization of our power resources.' This expression of the purpose of the Act would not appear to express any intent by Congress to separate Federal control over land use from Federal control over water use or water-power development, as suggested by Petitioners, since 'every legitimate public interest' could not be protected by the Commission without control over both land and water uses, subject, of course, to vested rights not claimed here which are protected by Section 27 of the Act.

"In the *First Iowa* case the Supreme Court has this to say concerning the purposes of the Act (pp. 180-181):

'It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.

'It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act, the statutory scheme of which has been several times reviewed and approved by the courts.'

"That Congress did delegate authority to the Commission to control water uses is expressly shown by the provisions of the Act. Section 4 (g) authorizes the Com-

mission to investigate 'any occupancy of, or evidence of intention to occupy, for the purpose of developing electric power, public lands, reservations * * *' and 'to issue such order as it may find * * * in the public interest to conserve and utilize the * * * water-power resources of the region.' Section 7 (a) requires the Commission to decide which of conflicting applications is best adapted to conserve in the public interest the water resources of a region. Both of these sections refer directly to the conservation of water resources whether in navigable streams or in non-navigable streams affecting lands of the United States. Section 10 (a) requires that any project licensed shall be best adapted to a comprehensive plan of development and, of course, such comprehensive development is not possible without Commission control over the use of available waters for power purposes.

"It is apparent that none of the sections of the Act looking directly to control of water use could be given any meaning in licensing projects on Government lands should the Court accept the Petitioners' interpretation of Section 9 (b) of the Act that the license issued for the Pelton Project is invalid because the Commission failed to require the Company to comply with State laws which Petitioners say control the water resources to be utilized by the project."

In the very recent case of Niagara Power Corp vs. Federal Power Commission, decided December 31, 1952, by the United States Court of Appeals for the District of Columbia (No. 10,862), it was held (p. 32), "An ap-

plicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him."

The question in this case was whether the Federal Power Commission correctly determined the amortization reserve liability, under section 10 (d) of the Federal Power Act, of a water licensee. Section 10 (d) provides, "that after the first twenty years of operation, use of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the net investment * * * the licensee shall establish and maintain amortization reserves * * *."

Long prior to the enactment of the Federal Water Power Act of 1920, 41 STAT. 1063, the Niagara Falls Power Company was the owner of plants on the Niagara River which utilized water from that stream in generating electric energy. It had certain water rights in the Niagara river through mesne conveyances to it (the details of which are not of controlling significance here), which rights it claimed were valid under the law of New York. After the passage of the Act of 1920, the Power Company applied to the Federal Power Commission for a license under the new statute to cover the operation of its existing plants and others then under construction. Such a license, which designated the plants as Project No. 16, was issued by the Commission on March 2, 1921.

After hearings, the Commission entered an order directing, among other things, that Niagara Falls Power Company (parent co. of Mohawk) place in an amortization reserve the sum of \$914,432.04 as one half of surplus earnings March 2, 1941, to December 31, 1946.

In fixing that figure the Commission increased the Power Company's computation of its amortization reserve liability by \$399,000. This was the result of two findings and conclusions: (a) the Commission disallowed as operating expense the Power Company's annual payment of \$99,000 to International Paper Company for the right to use 730 cubic feet per second (cfs) of water for power development,—a water right which had been conveyed to the Power Company by the Paper Company by defeasible grant which reserved that yearly payment. The total disallowance for the initial period on this score was \$577,500. (b) The Commission artificially increased the Power Company's revenue for the initial period by \$220,500, by disallowing a rate concession amounting to that sum which had been given by the Power Company to its parent, Buffalo Niagara Electric Corporation, as the consideration for the right to use 262.6 cfs of water for power development—the "Pettebone-Cataract" water rights—which it had acquired from Buffalo Niagara by contract.

These two adjustments increased the Power Company's surplus earnings for the initial period by \$798,000. One half of that sum—\$399,000—is the amount by which the Commission's order increased the required amortization reserve. The Commission's order which

disallowed the rate concession to Buffalo Niagara and the payments to International Paper during the initial period also required that they be disregarded in computing amortization reserve liability during the remainder of the license period.

Niagara-Mohawk became the owner of all the assets of Niagara Falls Power Company and succeeded it as licensee of Project No. 16, thereby becoming subject to the Commission's order which we have just described.

In a petition for review, Niagara-Mohawk sought to have modified the Commission's order by holding that Buffalo Niagara and International Paper had valid water rights for the use of which it was obligated by a contract, together with the considerations which the Commission had disallowed; and to reduce accordingly the required amortization reserve.

Niagara Mohawk's remote predecessors in hydraulic power development at Niagara Falls constructed a canal, which was completed in 1861, tapping the Niagara River nearly a mile above the Falls and conveying water to a canal basin on the High Bank of the river approximately one-half mile below the Falls. The proprietors of the canal conveyed various mill sites to others with rights to use water for generating power. This water was drawn not from the river but from the canal basin. The general method of power development at that time was to sink shafts or pits at the edge of the cliff under the mills, and to use water from the canal to drive turbines at the bottom of the pits. After such use the water

escaped through tunnels to the face of the High Bank and thence back into the river.

The petitioner's later predecessors, as a part of the program of developing and disposing of electric energy, continued the policy of purchasing various tracts of land in the vicinity of their power facilities to be sold or leased to industrial power customers, sometimes with the right to use water to develop power. Out of this practice arose the two water rights involved in this proceeding.

The Federal Power Commission contended that the water rights of the Petitioner were invalid for the reason that there cannot be private ownership of the water of a navigable river of the United States. In rejecting the Commission's contention, the court said (pp. 13-16):

"We observe, however, that the water rights in question do not rest upon a claim of ownership of the running waters of the Niagara. It is a usufructuary property right in the waters which is asserted—a vastly different thing, which was recognized at common law and has been confirmed by judicial decisions.

"The distinction between absolute ownership of flowing waters and the right to use them temporarily was aptly stated in *Sweet v. City of Syracuse*, 129 N. Y. 316, 335, 27 N. E. 1081, 1084 (1891):

' . . . It is a principle, recognized in the jurisprudence of every civilized people from the earliest times, that no absolute property can be acquired in flowing water. Like air, light, or the heat of the sun, it has none of the attributes commonly ascribed to property, and is not the subject of exclusive dominion or control. As Blackstone observes, (2 Bl. Comm.

18:) "Water is a movable, wandering thing, and must of necessity continue common by the law of nature; so that I can have only a temporary, transient, usufructuary property therein." While the right of its use, as it flows along in a body, may become a property right, yet the water itself, the *corpus* of the stream, never becomes, or, in the nature of things, can become, the subject of fixed appropriation or exclusive dominion, in the sense that property in the water itself can be acquire or become the subject of transmission from one to another. Neither sovereign nor subject can acquire anything more than a mere usufructuary right therein, . . .'

"So, although neither Buffalo Niagara, nor International Paper, nor Niagara Mohawk has any title to the water flowing in the Niagara, the question is whether they have 'a temporary, transient, usufructuary property therein.' That depends upon the law of New York because, as the Supreme Court said in *United States v. Chandler-Dunbar Company*, 229 U. S. 53, 60 (1913),

'The technical title to the beds of the navigable rivers of the United States is either in the States in which the rivers are situated, or in the owners of the land bordering upon such rivers. Whether in one or the other is a question of local law.'

"Under the law of New York a riparian owner's right to use the waters of a stream for power purposes is a part of his estate, *United P. B. Company v. Iroquois P. & P. Company*, 226 N. Y. 38, 123 N. E. 200 (1919); *Waterford Electric Light, Heat and Power Company v. The State of New York*, 208 App. Div. 273, 203 N. Y. Supp. 858 (1924), *affirmed* 239 N. Y. 629, 147 N. E. 225, and is a corporeal hereditament, *Van Etten v. The City of New York*, 226 N. Y. 483, 124 N. E. 201 (1919).

“This usufructuary right is an incident to riparian ownership and does not depend upon grant or prescription. It is subject to the paramount right of the State to utilize the waters for a public purpose without paying compensation therefor; but, until the State exercises its paramount right, the riparian owner’s usufructuary right is unimpaired. These principles were stated by the New York courts in *People ex rel. Niagara Falls Hydraulic Power and Manufacturing Company v. Smith*, 70 App. Div. 543, 75 N. Y. Supp. 1100 (1902), *affirmed* without opinion 175 N. Y. 469, 67 N. E. 1088 (1903), with express reference to the water rights from which those in question here derive. The court said that Niagara Falls Hydraulic Power, one of Niagara Mohawk’s predecessors,

‘. . . as a riparian owner and as owner of the lands under the waters of the Niagara River adjacent to its uplands from which the water is immediately taken, has the right to use of the waters of the river for manufacturing purposes, and to divert the same for that purpose, returning them to the river, as it does, after passing over its own lands (citations), subject only to the paramount right of the State to utilize these waters for a public use, without compensation to such riparian owners; all riparian rights remaining unimpaired until the exercise of such paramount right by the State. This being so, it appears that the re-lator, as riparian owner, had the right to take waters from the Niagara river for manufacturing purposes, not interfering thereby with the navigability of the stream; such right being in no sense in the nature of a franchise, but a corporeal hereditament, not depending either upon grant or prescription.’ (Emphasis supplied)

“Since the usufructuary property right of Niagara Falls Hydraulic and its successors was and is

subject to the superior right of the State of New York, in order to see whether the right still exists it is necessary to ascertain whether the State has exercised its paramount authority and, if so, to what extent."

And (p. 17),

"From the various legislative enactments to which we have referred, it is seen that New York has exercised its sovereign paramount authority to regulate the use of Niagara waters by restricting the original riparian rights upon which the Pettebone-Cataract and International Paper rights depend. It has limited the quantity of water which may be used, and has exacted a rental charge for its use. But the legislature has not destroyed the riparian rights, as it might have done by pre-empting the entire available flow; rather, it has confirmed the rights as limited and defined in the several statutes."

Also (p. 19),

"In summing up its argument that the water rights asserted here do not exist under the law of New York and should not be recognized by this court, the Power Commission assigns three reasons for its position: (a) 'there can be no perpetual right to use the water of a navigable river'; (b) 'any permission given by the State may be withdrawn at any time when the State so decides, without compensation for the loss of the privilege'; and (c) 'It has not been shown that either Buffalo Niagara or International Paper Co. held authority from the State Water Power and Control Commission to use the water from March 1 (sic), 1941, to December 31, 1946.' None of these reasons supports the Commission's conclusion."

In holding that the water rights in question were valid usufructuary property rights under the New York law, the Court said (pp. 32-34):

“Much of the difficulty in this case has arisen from what we regard as a misconception of the Water Power Act and of the nature of licenses issued thereunder. The Act is purely a regulatory measure. A federal license is not an original grant of authority, but a permission to use a state’s grant of authority. To be sure, a license is a prerequisite in that water rights under state law in a navigable stream may not be exercised without one, as the Supreme Court held in the *New River* case. And when state law or regulation conflicts with the Act, or with any lawful federal regulatory action, or with lawful terms of a federal license, state authority must yield to federal, as the Supreme Court held in the *First Iowa* case. But these considerations do not by any means require the conclusion that the Act and a license thereunder constitute the source from which all water rights flow. An applicant for a license must show the Commission he has under state law the right to divert the water for the use of which he desires a license. Unless he has that right, we think the Commission cannot lawfully issue a license to him.

“The Power Commission says in the course of its argument, ‘Neither Buffalo Niagara nor its predecessors in interest, nor the International Paper Company own any lands riparian to the Niagara River to which the alleged water rights are claimed to be appurtenant.’ It also states that neither Buffalo Niagara nor International Paper has a license, with respect to the rights, from either the Federal Power Commission or the New York Water Power and Control Commission.

“The statement that neither Buffalo Niagara nor its predecessors in interest own any riparian land to which the Pettebone-Cataract water rights are appurtenant is incorrect. The Niagara Falls Hydraulic Power and Manufacturing Company owned such riparian land and, by valid grant to the Pettebone-Cataract companies, severed from the land the right to take 262.6 cfs under a partial head,

reserving the right to utilize that water under the remaining head. The Pettebone-Cataract rights passed to Niagara Lockport, which was succeeded by Buffalo Niagara. It is thus seen that Buffalo Niagara's predecessor in interest owned riparian land. The right to 262.6 cfs, though severed, continued to be in the nature of a riparian right. Such a corporeal hereditament is a property right which may be conveyed apart from the land to which it is incident. The water rights of International Paper had a similar origin.

"Nor is it necessary to the validity of the two sets of usufructuary property rights that Buffalo Niagara and International Paper have either state or federal licenses. Such authority must be held by him who exercises the rights. Niagara Mohawk, which is the user, holds a federal license therefor and, as we have shown, is not required to have a State license because it pays rent to the State of New York for the water utilized.

"We hold that the Pettebone-Cataract and International Paper water rights are valid usufructuary property rights under the law of New York; that the Treaty of 1910 did not destroy them but preserved their integrity; that the Water Power Act of 1920 did not extinguish the rights but simply forbade their use without a federal license; that such a license is not the source of water rights but a permission to exercise usufructuary rights acquired pursuant to State law; that the payments made by the petitioner under its contractual obligations as lessee of the water rights are proper operating expenses.

"It follows that the Federal Power Commission erred in disallowing the payments in question and in increasing on that account the petitioner's amortization reserve liability. The case will be remanded to the Commission with instructions to modify its order of September 27, 1950, in accordance with the views herein expressed."

CONCLUSION

Petitioners submit that neither the respondent nor the intervenor has met or has refuted any of the propositions of law advanced by the petitioners on this review. On the contrary, their theory of the case under which they seek to support the validity of the order of the respondent issuing the license herein, has been completely repudiated by the Court in the Mohawk case.

Petitioners therefore respectfully pray that the order of the Federal Power Commission be set aside.

Respectfully submitted,

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No. 13345

**In the United States Court of Appeals
for the Ninth Circuit**

THE STATE OF OREGON, THE FISH COMMISSION OF
OREGON, THE OREGON STATE GAME COMMISSION,
PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PORTLAND GENERAL ELECTRIC COMPANY, INTERVENOR

PETITION OF THE UNITED STATES OF AMERICA AND THE
FEDERAL POWER COMMISSION FOR A REHEARING

FILED

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PAUL P. O'BRIEN
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In the United States Court of Appeals for the Ninth Circuit

No. 13345

THE STATE OF OREGON, THE FISH COMMISSION OF
OREGON, THE OREGON STATE GAME COMMISSION,
PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT
PORTLAND GENERAL ELECTRIC COMPANY, INTERVENOR

PETITION OF THE UNITED STATES OF AMERICA AND THE FEDERAL POWER COMMISSION* FOR A REHEARING

To the Honorable Judge STEPHENS, Judge HEALY
and Judge ORR, Judges of the United States
Court of Appeals for the Ninth Circuit:

Come now J. Lee Rankin, Assistant Attorney General, Willard W. Gatchell, General Counsel for the Federal Power Commission, and William H. Veeder, Special Assistant to the Attorney General, for and on behalf of the United States of America and the Federal Power Commission, pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, and petition this Honorable Court for a Rehearing, predicated that petition upon the grounds and for the reasons hereinafter set forth, and

*Wherever the United States of America is used, that reference includes the United States of America and the Federal Power Commission.

Respectfully suggest to this Honorable Court, to its Chief Judge and all members of this Court that:

[1] The opinion, dated February 18, 1954, of this Honorable Court in the above-entitled case is of great and far-reaching importance to the welfare of the Nation and in particular to those states which constitute the Ninth Judicial Circuit of the United States;

[2] The subject opinion is contrary to and at variance with—

(a) The decisions and laws of the State of Oregon;

(b) The decisions of this Honorable Court;

(c) The decisions of the Supreme Court of the United States of America;

(d) The express will of Congress;

[3] The subject decision being at variance with and contrary to a long and uninterrupted line of earlier decisions by this Honorable Court has injected grave uncertainty respecting cases now on appeal or otherwise before this Honorable Court; now pending or in the process of being tried in the states constituting the Ninth Judicial Circuit; now pending before the Supreme Court of the United States of America;

Now, therefore, your petitioners most respectfully suggest to this Honorable Court that there be granted to your petitioners a rehearing en banc.

J. LEE RANKIN,
Assistant Attorney General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

WILLIAM H. VEEDER,
Special Assistant to the Attorney General.

Dated -----

DISTRICT OF COLUMBIA, ss:

The undersigned, acting for the United States of America and the Federal Power Commission, being duly sworn, depose and say: That they are J. Lee Rankin, Assistant Attorney General; Willard W. Gatchell, General Counsel for the Federal Power Commission; and William H. Veeder, Special Assistant to the Attorney General, and that they are immediately responsible for the conduct of the proceeding referred to in the accompanying Petition and Suggestion for Rehearing; they have read the above and foregoing Petition and Suggestion and know the contents of them; that the Petition and Suggestion are true to their knowledge.

J. LEE RANKIN,
Assistant Attorney General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

WILLIAM H. VEEDER,
Special Assistant to the Attorney General.

Subscribed and sworn to before me this —— day
of ———, 1954.

-----,
Notary Public.

My commission expires:

STATEMENT

Analysis of subject opinion

This Honorable Court rendered its decision in the subject case on February 18, 1954. It there declared that a license issued by the Federal Power Commission to the Portland General Electric Company for

the Pelton Project, a hydroelectric project on the Deschutes River “trenched upon the sovereignty of the State of Oregon.” That decision was based upon this Honorable Court’s conclusion that the ownership of the site of the power dam “does not empower the United States government to use the waters of the Deschutes River either at the site of the power dam or elsewhere, contrary to Oregon state law. * * * Oregon has the right to regulate its own waters in its own chosen way.”¹

By its opinion this Court recognizes the power of the “Commission * * * to give its *approval* to the [Pelton] Project as a whole.” It does not doubt that the Commission “has the right to grant its *permissive license* to the *construction* of the proposed dam upon its [the United States of America’s] own property.” Objection is, however, directed to the license issued by the Commission as it purports “to grant the complete legal right to the construction and operation of the whole Project,” for the reason that the license thus granted was “contrary to Oregon state law.”

There are reviewed in the subject opinion the objections registered by the State of Oregon, the Fish Commission of Oregon, and the State Game Commission. These are the charges against the applicant for license, the Portland General Electric Company:²

1. [It] failed to obtain a permit from the Hydro-Electric Commission of Oregon.

¹ These quoted excerpts are taken from the two final paragraphs of the majority opinion.

² Opinion, page 3.

2. [It] had not complied with the Oregon law as to fish in the river.

It is likewise asserted by the State and its agencies that the Pelton Project³ “would prevent the ascent of anadromous fish to their spawning grounds above the dam sites, and would result in the serious curtailment of the fish population and prevent its increase, and would impair the productivity and usefulness of the extensive State Fish Hatchery on the Metolius River.”

Having reviewed the powers of the Commission in the light of the objections, this Honorable Court declared:

Our conclusion as to the meaning and effect of Sec. 9 (b) [of the Federal Power Commission Act] does not, however, destroy the objectors’ case, for they rely upon the more fundamental claim that the Deschutes River is a state stream and that the State of Oregon has sovereign power over it and its waters.⁴

Thereafter the Court proceeded “to the question of the sovereign power over the waters of the Deschutes River,” adding “We think the regulation of the river as it flows through the state is one of the powers of the state’s sovereignty and includes regulatory powers as to fish in state waters.”⁵

Respecting the sovereign power over the stream last mentioned reference is made to the Congressional Acts of 1866, 1870, and the Desert Land Act of 1877

³ Opinion, page 2, last paragraph.

⁴ Opinion, page 6, 2d full paragraph.

⁵ Opinion, page 8; page 10.

which separated the title “of western lands in the public domain” “from the right to the control of the water and allowed the states, within which such waters flowed, to regulate them.” The opinion then alludes to the Water Code of the State of Oregon enacted in the year 1909, which declared at that date that “All water within the State from all sources belong [*sic*] to the public.” Based on a review of the last-cited Congressional and State acts, this Honorable Court concluded:

Whatever, if any, limitation there was on Oregon’s complete sovereignty over the waters of the Deschutes River, was wiped out by the Desert Land Act of 1877.⁶

Crux of this Honorable Court’s opinion is, therefore, that the United States of America has relinquished to the State of Oregon full control over the Deschutes River; that the State of Oregon has assumed full control over that stream; that as a consequence the United States of America is precluded from taking any action respecting the use of the waters of that stream upon lands title to which resides in the United States of America which is “contrary to Oregon state law.”

Circuit Judge Healy’s dissenting opinion

Judge Healy of this Honorable Court has reviewed in his dissenting opinion certain fundamental principles which, it is respectfully submitted, are predicated upon a virtually unbroken line of decisions of this Honorable Court which are precedents for his

⁶ Opinion, page 8; page 9, first paragraph; page 10.

conclusions. Your Petitioner respectfully reiterates those principles, tendering, however, to this Honorable Court principles and precedents that fully warrant its granting the rehearing so important to the Western development and to the Nation's welfare.

The relationship between the United States of America and the State of Oregon respecting the waters of the Deschutes River—the restrictions on Oregon's powers respecting the subject matter of the case

There passed to the United States of America by its treaty of 1846 with Great Britain the lands now constituting the State of Oregon.⁷ Traversing a portion of that great area of public domain was the Deschutes River. That the stream and the lands through which it flowed were subject to the control of Congress by reason of the Constitution of the United States of America is not susceptible of question.⁸ Pursuant to that and related investitures of Constitutional power, the Congress enacted legislation creating the Territory of Oregon.⁹ That Act constituted the temporary government, defined its boundaries and “provided, that nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights remain un-

⁷ Treaty between the United States and Great Britain, concluded June 15, 1846; Proclaimed August 5, 1846. See *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142 (1934).

⁸ Constitution of the United States, Article IV, Sec. 3, Cl. 2: “The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States * * *.”

⁹ Act of Congress, August 14, 1848; 9 Stat. L. Ch. 177, Sec. 1, p. 323.

extinguished by treaty between the United States and such Indians, or to affect the authority of the government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the government to make if this act had never been passed; * * *."

Respecting the properties of the United States of America the last cited act provided that, "no law shall be passed interfering with the primary disposal of the soil."¹⁰ On June 25, 1855, a Treaty was entered into between the United States of America and the Confederated tribes of Indians in Middle Oregon.¹¹ There was thus ceded by the Indians to the United States of America an immense area of inestimable value. Reserved by the Indians in their Treaty was an area: "Commencing in the middle of the channel of the De Chutes River". That reserved area was thence delineated with a description which concludes: "thence down the main branch of De Chutes River; heading in this peak to its junction with De Chutes River; and thence down the middle of the channel of said river to the place of beginning."¹²

Parenthetically, in regard to the Treaty, this statement must be accorded great weight:

When considering the nature of the grant under consideration, we must not forget that it was not a grant to the Indians, but was one

¹⁰ Section 6.

¹¹ 12 Stat. 963.

¹² 12 Stat. 964.

from them to the United States, and all rights not specifically granted were reserved to them.¹³

Consonant with the principle that it was a cession by the Indians to the United States of America, not the reverse, is this express provision of the Treaty that—

the exclusive right of taking fish in the streams running through and bordering said reservation is hereby secured to said Indians.¹⁴

On June 3rd, 1859, the people of the State of Oregon adopted the proposition propounded by Congress in these terms: “Be it ordained by the legislative assembly of the state of Oregon, That the said state shall never interfere with the primary disposal of the soil within the same by the United States, * * *.” Important likewise is the provision of the Constitution of the State of Oregon that “All laws in force in the territory of Oregon when this constitution takes effect, and consistent therewith, shall continue in force until altered or repealed.”¹⁵

Clear from the brief résumé is the fact that the territorial laws limited the power of the State of Oregon respecting Indian lands; that the Indians “*reserved*” the property now constituting the Warm Springs Indian Reservation to the middle of the Deschutes River and “*secured*” to themselves the exclusive right to fish in that stream in those reaches of it that border upon or traverse the reservation.

¹³ *United States v. Hibner et al.*, 27 Fed. 2d 909, 911 (D. C. E. D. Idaho 1928).

¹⁴ 12 Stat. 964.

¹⁵ Opinion, page 3, footnote 4. Oregon Constitution of 1859, Sec. 7, Article XVIII.

Too great stress may not be placed upon these facts: The Warm Springs Indian Reservation was never a part of the public domain; was specifically reserved by the Treaty of 1855 for the Indians; accorded to them by that Treaty was the exclusive right of fishery in the Deschutes River. Moreover, the reservation lands extended to the middle of the stream in question. The State of Oregon by the Territorial laws; the Act granting admission of that State to the Union; by its Constitution, was precluded from legislating in regard to the property of the Indians.

Stress must likewise be placed upon this statement from the subject opinion:

* * * the principal or upper dam is to be built upon and affects land reservations of the United States, inclusive of the lands of the Warm Springs Indian Reservation. The Indians of the Reservation have given their consent to the construction of the [Pelton] Project.

Withdrawal of public lands for power purposes—the dates of withdrawal—Oregon's enactments—their dates

Reviewed in the phases immediately preceding are the pertinent elements respecting the jurisdiction of the United States of America over the Warm Springs Indian Reservation; the rights of the Indians reserved and preserved for them by the Treaty. From that review is revealed the pertinent fact that the western half of the main project to the thread of the Deschutes River is within the Warm Springs Indian Reservation.

Consideration is next directed to that portion of the Pelton Project which will occupy the stream east

of its thread. As recognized by the subject opinion, those lands are owned by the United States of America. Moreover, the vast majority of the lands to be flooded are owned by the United States of America or are located in the Warm Springs Indian Reservation. No factor of importance here has been ascribed in the opinion to the acreage in private ownership which would be submerged by the reservoir.

All of the lands, both Indian and those on the east bank, were withdrawn for power purposes. That was accomplished by the Order of the Secretary of the Interior dated December 30, 1909, made permanent by the Executive Order of July 2, 1910.¹⁶ Subsequent withdrawals for power purposes including the tribal lands were made November 1, 1910,¹⁷ and October 8, 1913.¹⁸

In the year 1931 the State of Oregon enacted comprehensive police regulations in regard to power projects.¹⁹ By that Act provision was made that "From and after the taking effect of this act, no water-power project involving the use of the waters * * * for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof."²⁰ To be noted is the fact that the law in question specifically provides that: "The provisions of this act shall not apply to any water-power project or development constructed by the government of the United

¹⁶ Pursuant to the Act of June 25, 1910 (36 Stat. 847).

¹⁷ Indian Power Site Reserve No. 2 (36 Stat. 855).

¹⁸ Executive Order October 8, 1913 (36 Stat. 847).

¹⁹ Vol. 8, Oregon Compiled Laws Anno., Sec. 119-101 et seq.

²⁰ Vol. 8, Oregon Compiled Laws Anno., Sec. 119-103.

States.”²¹ In the year 1932 the Constitution of the State of Oregon was amended to provide: “The rights, title and interest in and to all water for the development of water power and to water power sites, which the State of Oregon now owns or may hereafter acquire, shall be held by it in perpetuity.”²² Legislation was likewise enacted by the State of Oregon in the year 1921 which, among other things, provided that:

It shall be unlawful for any person to construct any dam or artificial obstruction across any stream in this state frequented by salmon or other food fish, or to maintain any such dam or obstruction heretofore erected without providing a passageway for such fish over such obstructions, such passageway for fish to be constructed as near the main channel as may be practicable.²³

Thus, if the timing is of any significance in the reasoning of the Court, two of the principal police regulations, and the Constitutional amendment relied upon by the State of Oregon in its objections to the license were enacted many years after the United States of America had withdrawn from the public domain for power purposes the power site in question.

Reference is likewise made by the objectors to the Territorial Act adopted by *Congress* which provided that “the rivers and streams of water in said Territory of Oregon in which salmon are found * * *

²¹ Vol. 8, Oregon Compiled Laws Anno., Sec. 119–101.

²² Constitution of Oregon, Article XI–D—State Power Development.

²³ Vol. 5, Oregon Compiled Laws Anno., Sec. 83–314.

shall not be obstructed by dams or otherwise, unless such dams or obstructions are so constructed as to allow salmon to pass freely up and down such rivers and streams.” Reliance was likewise placed by the objectors upon the provision of the Water Code of 1909 which provided: “All waters within the state from all sources of water supply belong [*sic*] to the public.” That police regulation and the Congressional Acts of 1866, 1870 and 1877 will be the subject of extended review in this consideration. Here, however, it is emphasized that the State of Oregon’s legislation “* * * cannot affect titles vested in the United States of America.”²⁴

There is no invasion; no encroachment and no interference with vested or inchoate rights on the Deschutes River by the Pelton Project

“It should be borne in mind that the licensing or construction of this hydroelectric project will in no way impinge upon vested rights or interfere with the appropriation, diversion, distribution or use of water of the stream for irrigation or other purposes,” in the succinct statement of Judge Healy, which emphasizes the care taken in connection with the Pelton Project to protect downstream users. Recognized by Judge Healy is the fact that the Portland General Electric Company seeks to apply the water to a non-consumptive use through the construction of dams on the main channel of the Deschutes River. Reflected by Judge Healy’s statement is this express condition in the Order of the Commission: R. 443

²⁴ Vol. 8, Oregon Compiled Laws, Anno., Sec. 116-401, *United States v. Utah*, 283 U. S. 64, 75 (1930).

Any rights to the use of waters in the Deschutes River and its tributaries in connection with the licensee's project under this license shall be subordinate to: (i) All existing rights, whether or not perfected, to the waters of the Deschutes River and its tributaries * * *.

Full protection is thus accorded rights to the use of water on the stream in question. It is difficult to perceive of greater care being taken to avoid downstream damage—a fact which is underscored by the costly structure built below the main dam to regulate the regimen of the river. Moreover, there are no claims here to the use of the waters of the Deschutes River with which the license would interfere, such as the claims in the *Niagara Mohawk* case decided March 15, 1954, by the Supreme Court.²⁵

Thus in the words of Judge Healy: "The sole grievance as respects the installation is that it will halt the ascent of anadromous fish (here, salmon and steel-head trout) to their spawning grounds on the upper reaches of the Deschutes." Yet the Commission found that there is "no substantial evidence to show that the facilities proposed for conserving the fish will not maintain existing runs. Moreover, there are indications that the runs can be increased."

Separate consideration is not directed to the question of the effect of the Pelton Project upon the fish runs for the reason that this Honorable Court has declared that: "* * * the regulation of the river as

²⁵ *Niagara Mohawk Power Corp. v. Federal Power Commission*, CADDC, 1952, 202 F. 2d 190; affirmed March 15, 1954, Supreme Court of the United States, No. 28, October Term, 1953.

it flows through the state is one of the powers of the state's sovereignty and includes regulatory powers as to fish in state waters." ²⁶ As the regulatory authority over both water and fish stems from police power of the State there is no need of differentiation in the consideration.

QUESTIONS PRESENTED

[1] Whether the police regulations of the State of Oregon enacted many years subsequent to the Treaty of 1855 and the withdrawal of power sites from the public domain could limit or in any way affect the powers of the United States of America?

[2] Whether the Congressional Acts of 1866, 1870, and 1877 limited [a] the powers of the United States of America to utilize the unappropriated waters of the Deschutes River upon the lands withdrawn for power purposes; [b] or could affect the rights of the Indians on the Warm Springs Indian Reservation?

[3] Whether, in the light of the fact that the State of Oregon is without power to impair the rights of the Indians, the police regulations which it enacted could in any way affect the lands or rights to the use of waters traversing or bounding the Warm Springs Indian Reservation?

In the succeeding phases of this memorandum of authorities in support of the petition for rehearing these basic principles of the law are reviewed:

(1) The lands reserved in the Treaty of 1855 between the United States of America and the Indians were never part of the public domain

²⁶ Opinion, page 10.

and were not and are not subject to the Acts of 1866, 1870, and the Desert Land Act of 1877.

(2) The lands reserved for power purposes by the United States of America were severed from the public domain and were not thereafter subject to the Acts of 1866, 1870, and the Desert Land Act of 1877.

(3) Although certain of the lands involved were once part of the public domain the United States of America was empowered to withdraw those lands; to issue a license in accordance with the provisions of the Federal Power Act subject to existing rights.

(4) The police regulations of the State of Oregon have no application to the United States of America and the lands and waters reserved by the United States of America for power purposes are not subject to those police regulations.

ARGUMENT

Lands severed from the public domain—lands reserved for the Indians are not subject to the Acts of 1866, 1870, and the Desert Land Act of 1877

“The United States being the absolute owner and proprietor of all of its public lands and having the full power of disposal, it has also the power to dispose of such lands as the Government by its Congress may from time to time provide.”²⁷ Continuing from the same source, this statement is quoted: “* * * the general Government, [is empowered] as owner of both the land and waters of the public domain, to reserve certain waters for its own use and for the

²⁷ Kinney on Irrigation and Water Rights, 2nd ed., vol. 1, sec. 413.

use of its wards—the Indians—on Indian, also on military, and other reservations.”

That source then, quoting from the opinion of this Honorable Court, concluded:

As was said in a recent opinion by the United States Circuit Court of Appeals [Ninth]: “* * * the United States may, where circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose, * * *.”²⁸

With reference to the power of the United States of America to administer its properties; to sever the waters from the land and dispose of them separately; to reserve, when necessary, the unappropriated waters, there is necessarily presented the question as to the breadth of application to be ascribed to the Acts of 1866, 1870 and 1877. Response to that inquiry is likewise to be found in the decisions of this Honorable Court. On the subject it has authoritatively stated:

The law is well settled that the doctrine of appropriation * * * applies only to public lands and waters of the United States. * * * And it is equally well settled that, when the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and that no subsequent law or sale should be construed to embrace or operate upon them.”²⁹

²⁸ Kinney on Irrigation and Water Rights, 2nd ed., vol. 2, sec. 667.

²⁹ *Winters v. United States*, 143 Fed. 740, 747, 748 (C. A. 9, 1906).

Frequently the courts have had occasion to review the applicability of the laws in question and in every instance have denied that they applied to lands severed from the public domain.³⁰ Respecting the withdrawal and severance of the public domain, the Supreme Court has declared:

The United States can prohibit absolutely or fix the terms on which its property may be used. * * * The courts cannot compel it to set aside the lands for settlement; or to suffer them to be used for agricultural or grazing purposes; nor interfere when, in the exercise of its discretion, Congress establishes a forest reserve for what it decides to be national and public purposes.³¹

When the Congress has thus set aside or authorized that lands be set aside from thence forward, the Acts of 1866, 1870 and 1877 by their express provisions are limited to the public lands. For as stated by this Honorable Court in a case squarely in point on the conclusion last expressed:

Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the Act of July 26, 1866, 43 U. S. C. A. § 661, requires recognition of those rights. That statute, however, applies only to "public" lands. * * * Lands which are reserved are severed from the public domain. * * * The statute mentioned, therefore, does not, we think, apply here. **Likewise, the Montana statutes regarding water rights**

³⁰ *United States v. Utah Power & Light Co.*, 209 Fed. 554, 560 (C. A. 8, 1913); affirmed 243 U. S. 389, 404 (1916).

³¹ *Light v. United States*, 220 U. S. 523, 536, 537 (1910).

are not applicable, because Congress at no time has made such statutes controlling in the [Indian] reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, "shall remain under the absolute jurisdiction and control of the Congress of the United States."³²

The conclusions there expressed by this Court are in full conformity with the rule adhered to by the Highest Court that "* * * lands which have been appropriated or reserved for a lawful purpose are not public * * *."³³

As emphasized, this Honorable Court and the Supreme Court of the United States have decided that the acts relating to the public domain—the Acts of 1866, 1870, and 1877—have no application to the lands which were never a part of the public domain or by subsequent legislation were removed from it.³⁴

This conclusion predicated upon that unvarying line of decisions of this Honorable Court and the Supreme Court, which have been reviewed, is respectfully submitted:

The United States of America has the full power under the Constitution, having with-

³² *United States v. McIntire*, 101 F. 2d 650, 654 (C. A. 9, 1939).

³³ *United States v. Minnesota*, 270 U. S. 181, 206 (1925).

³⁴ *Winters v. United States*, 207 U. S. 564 (1908); *United States v. Powers*, 305 U. S. 527 (1939); *United States v. Walker River Irrigation District, et al.*, 104 F. 2d 334 (C. A. 9, 1939); *Conrad Investment Co. v. United States*, 161 Fed. 829 (C. A. 9, 1908); *United States v. McIntire*, 101 F. 2d 650 (C. A. 9, 1939); *United States v. Parkins*, 18 F. 2d 643 (D. C. Wyo. 1926); *Skeem v. United States*, 273 Fed. 93 (C. A. 9, 1921). *United States v. Rio Grande Irrigation Company*, 174 U. S. 690 (1899).

drawn the lands from the public domain, to grant the licensee, subject to existing rights, the privilege of constructing and maintaining the Pelton Project which is here involved. That conclusion is, of course, equally applicable to the lands and the rights to the use of water reserved in connection with the Warm Springs Indian Reservation which were never part of the public domain.

Police powers of the State of Oregon may not be invoked to defeat the fulfillment by the National Government of its responsibilities ³⁵

Reference is made in the subject opinion ³⁶ to the objections registered by the State of Oregon. It is asserted by the State that the Portland General Electric Company had failed to obtain a permit from the Hydro-Electric Commission of Oregon. Reliance by Oregon is placed upon its statute which provides that after the effective date of the act

* * * no water-power project involving the use of the waters * * * within the state of Oregon, * * * for the generation of electricity, shall be begun or constructed except in conformity with the provisions hereof.

³⁵ To be noted: In its opinion this Honorable Court has directed its conclusions to the United States of America. They do not relate to the licensee, the Portland General Electric Company. On the subject this precise statement is made in the opinion: "Whether the right of a licensee of the government to use government property is as broad as the government's right to use it, is not raised in the case and we have not considered it." Thus the authorities and comments which are here made pertain to the National Government as distinguished from the licensee.

³⁶ *The State of Oregon, et al. v. Federal Power Commission, et al.*, decision of February 18, 1954, pages 2 and 3, footnotes 3 and 4.

That last cited act became law in the year 1931. Reliance is likewise placed upon a statute which provides that "It shall be unlawful for any person to construct any dam or artificial obstruction across any stream in this state frequented by salmon * * * without providing a passageway for such fish over such obstructions, * * *." The latter enactment became law in the year 1921.³⁷

An analysis of the character of the act first set forth will facilitate a disposition of the issues which are here presented. Fortunately this Honorable Court has had occasion to comment upon the laws of the State of Oregon respecting the use of water.³⁸ This Court declared that they were adopted pursuant to the police power of the State as part of a comprehensive system for the acquisition and adjudication of rights to the use of water. That conclusion comports with Wiel's authoritative statement that regulation of rights to the use of water stems from "the police power of the State."³⁹ It has likewise been declared that "* * * the public authority, under the police power, may enact and enforce reasonable regulations in respect of the exercise of the right of appropriation."⁴⁰

³⁷ Vol. 8, Oregon Compiled Laws Annotated, Sec. 119-103; Vol. 5, Oregon Compiled Laws Annotated, Sec. 83-314.

³⁸ *California-Oregon Power Company v. Beaver Portland Cement Co.*, 73 F. 2d 555 (C. A. 9, 1934); affirmed 295 U. S. 142 (1934).

³⁹ Wiel, *Water Rights in the Western States*, 3d ed., vol. 2, sec. 1184, page 1097.

⁴⁰ 56 Am. Jur., *Waters*, Sec. 295, page 745; 56 A. L. R. 283.

Important is this fact that our Highest Court, regarding a similar statute in the State of Arizona, has declared it to be a State police regulation.⁴¹ Seldom will there be found a decision having such precise bearing on a problem. From that case this extremely relevant statement is taken:

The wrongs against which redress is sought are, first, the threatened invasion of the quasi-sovereignty of Arizona by Wilbur [Secretary of the Interior] in building the dam and reservoir without first securing the approval of the State Engineer as prescribed by its laws; * * *.

Continuing, the Court declared:

First. The claim that quasi-sovereign rights of Arizona will be invaded by the mere construction of the dam and reservoir rests upon the fact that both structures will be located partly within the State. * * * [Arizona's] statutes prohibit the construction of any dam whatsoever until written approval of plans and specifications shall have been obtained from the State Engineer; * * *.

Non-compliance with Arizona's laws was thus recognized by the Court:

The United States has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.

Thus the Supreme Court had before it an exact counterpart of the problem here presented: Is a Federal official or agency bound to comply with State

⁴¹ *Arizona v. California*, 283 U. S. 423, 451 (1930).

regulations governing the construction of dams? An emphatic negative to this inquiry is contained in the Court's reply:

The United States may perform its functions without conforming to the police regulations of a State. * * * If Congress has power to authorize the construction of the dam and reservoir, Wilbur [Secretary of the Interior] is under no obligation to submit the plans and specifications to the State Engineer for approval.

Like the police regulation respecting the height of structures, the authority to control fish resides in the State by reason of its police power. On the subject this statement has been made:

It is well established that * * * control over the waters within its boundaries, and over the fish and game, * * * is within the police power of a State * * *.⁴²

Our Nation's freedom to act within the sphere of its authority without restraint by State police regulations pertains to all of its powers and not just those stemming from the Commerce Clause which was the source of its power in the last cited case. There has been unswerving adherence to the principle now being reviewed. When, in violation of State game laws, an official of the Forest Service, acting under the direction of the Secretary of Agriculture, killed deer which were destroying a National Forest, the Highest Court declared:

⁴² Kinney on Irrigation and Water Rights, 2nd ed., vol. 1, sec. 369, p. 625.

The direction [to kill the deer] given by the Secretary of Agriculture was within the authority conferred upon him by act of Congress. *And the power of the United States to thus protect its lands and property does not admit of doubt, * * * the game laws or any other statute of the state to the contrary notwithstanding.* [Emphasis supplied.]

As this Court specifically declared:

The federal Constitution delegates to Congress, absolutely and without limitations, the general power * * * concerning the public domain, * * *.

The exercise of that power cannot be restricted or embarrassed in any degree by state legislation.⁴³

Further references to authorities would be of no assistance to this Court. Suffice to state that from the formative years of our country there has been general adherence to Justice Marshall's statement that: "To impose on it the [United States of America] the necessity of resorting to means which it cannot control, which another government [the State] may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments, which might disappoint its most important designs, and is incompatible with the language of the constitution."⁴⁴

Accepting the rationale of Justice Marshall's last quoted statement, it is difficult to perceive of a more

⁴³ *Hunt v. United States*, 278 U. S. 96, 100 (1928); *Shannon v. United States*, 160 Fed. 870, 874 (C. A. 9, 1908).

⁴⁴ *McCulloch v. Maryland*, 17 U. S. 315, 422 (1819).

striking instance of subverting the will of Congress within its sphere of constitutional authority to the control of the State. Here, it is respectfully submitted, is a prime instance of the property of the United States of America being “completely at the mercy of state legislation.”⁴⁵

Premised on the cited decisions this Honorable Court is respectfully requested to reconsider the opinion to which this petition and brief pertain.

Oregon’s declaration in the year 1909 that “all water within the State from all sources of water supply belong [sic] to the public”⁴⁶ is an exercise of the sovereign power to regulate—not a claim to title as a proprietor or owner of the water

In that phase of this consideration which immediately precedes it was emphasized that the statute of the State of Oregon respecting the acquisition and administration of rights to the use of water was adopted in the exercise of its police power. That is, of course, the source of regulatory power which the States have historically exercised. When the State of Oregon, in the year 1909, enacted its comprehensive code respecting rights to the use of water, it did not by legislative fiat invest itself with title to all of the rights to the use of water within the State, including those appurtenant to the Warm Springs Indian Reservation.

In a relatively recent case the Supreme Court of the State of Utah, respecting its prototype of that here involved, held: “The statutory declaration that

⁴⁵ *Camfield v. United States*, 167 U. S. 518, 526 (1896).

⁴⁶ Vol. 8, Oregon Compiled Laws Annotated, Sec. 116–401.

‘The water of all streams and other sources in this State * * * is hereby declared to be the property of the public’ does not vest in the state title or ownership of the water as a proprietor.”⁴⁷ Thus, continued that court, the declaration may relate only to that water “that is subject to appropriation and use, being subject at all times to the existing rights to the use thereof.”⁴⁸

As declared: “The effect of the dedication of the waters of a State to the State or to the people confers no ownership of title in the running waters flowing within such respective jurisdictions. * * * The public ownership if any distinction is made, is rather that of sovereign than that of a proprietor. Therefore, such a declaration confers upon the State the powers of administration or regulation of the waters flowing within its boundaries, and also the power of regulating the appropriation and use of such waters as between the respective individual claimants thereto. In other words, the State acts under these terms of dedication in its sovereign capacity only, and not as proprietor or owner of the water.”⁴⁹

Similarly, the Supreme Court of the State of Idaho has decided:

We think it is clear that the title to the public waters of the state is vested in the state * * *.

This is not, however, an interest or title in the

⁴⁷ *Wrathall v. Johnson*, 86 Utah 50, 40 P. 2d 755, 777 (1935).

⁴⁸ *Ibid.*, 86 Utah 50, 40 P. 2d 755, 779 (1935).

⁴⁹ Kinney on Irrigation and Water Rights, 2d Ed., Vol. 1, Sec. 387.

proprietary sense, but rather in the sovereign capacity as representative of all the people * * *.

Reason for that conclusion is expressed by the court:

It will be found that the authorities quite uniformly class wild animals, fish, water, gas, light and air as things of the "negative community" or the property of no one, and that they are consequently *res communes* and subject to the regulation and control of the state in its sovereign capacity.⁵⁰

As stated by the Highest Court respecting migratory birds which are placed by the authorities in the same category as running water:

The State as we have intimated founds its claim of exclusive authority upon an assertion of title to migratory birds, an assertion that is embodied in statute. No doubt it is true that as between a State and its inhabitants the State may regulate the killing and sale of such birds, * * * To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.⁵¹

Judge Pope of this Honorable Court, with great clarity, has summarized, in a dissenting opinion, the principles which have been reviewed above.⁵² His succinct statements embraced the principles here involved when he declared with reference to statutes providing that all waters are the property of the public: "* * *

⁵⁰ *Walbridge v. Robinson*, 22 Idaho 236, 125 Pac. 812, 814 (1912).

⁵¹ *Missouri v. Holland*, 252 U. S. 416, 434 (1919).

⁵² *People of the State of California v. United States*, 180 F. 2d 596, 608 (C. A. 9, 1950).

such enactments have always been held to be mere general declarations that the waters within the state shall be available for acquisition by the people in accordance with local laws. Such a statutory declaration has no more force or effect as basis for the establishment of property rights than the somewhat similar statutory declaration that wild animals and birds are the property of the people of the state.”

This Court in its review of the Water Code of Oregon as emphasized earlier, voiced general acceptance of the concept that the State laws in question are police regulations.⁵³ It is respectfully submitted in concluding the present phase of this consideration, that: Oregon’s statute enacted in 1909—a half century subsequent to its admission into the Union—declaring “all waters within the state from all sources of water supply belong to the public”—

[1] was an exercise of the State’s police power;

[2] was not a claim of title as a proprietor, but rather the act of a sovereign for purposes of regulation;

[3] was not confiscatory of the vested rights of the individual or of the National Government.

Oregon’s declaration in 1909 that “all waters within the State from all sources of water supply belong [sic] to the public” did not take vested rights without due process

When Oregon adopted its comprehensive Water Code it did so in a manner which did not impair

⁵³ *California-Oregon Power Company v. Beaver Portland Cement Co.*, 73 F. 2d 555 (C. A. 9, 1934).

vested rights. That principle is explicit from the statute; it is manifest from the opinions of that State's highest court. By statute Oregon's declaration in 1909 that all waters within the State belong to the public was subject to this limitation: "* * * nothing herein contained shall be so construed as to take away or impair the vested right of any person, firm, corporation, or association to any water * * *." ⁵⁴

With reference to springs, Oregon's supreme court, reiterating with emphasis the language of the last quoted statute, ruled: "The statute of this state, providing for appropriation for beneficial use of the waters of the state, provides for such appropriation of public waters and not of private waters. * * * The existing rights or vested rights are carefully preserved by the provisions of the statute." ⁵⁵

In regard to riparian rights on the Rogue River, a meandering non-navigable stream in the State of Oregon, this Court in a decision respecting the Oregon Water Code made this declaration: "To argue, as plaintiff does, that riparian rights are real property rights which attach to the land, does not put such rights beyond the reach of the police power. * * * The modification of riparian rights which the act of 1909 has effectuated is not so drastic a change as to amount to taking of property without due process of law. * * * At common law, the usufruct of the riparian owner was not absolute; it was conditioned on the equal right of every other riparian

⁵⁴ Vol. 8, Oregon Compiled Laws Annotated, Sec. 116-402, as amended L. 1945, Ch. 58, sec. 1.

⁵⁵ *Henrici v. Paulson*, 134 Ore. 222, 293 Pac. 424, 425 (1930).

owner to the use of the water. By the Oregon legislation, his usufructuary privileges were not destroyed; * * * This legislation, however, has changed the conditions under which the riparian owner's privilege otherwise to use the water may be exercised."⁵⁶ In passing, it is observed that the Supreme Court of the United States of America did not consider the last quoted phase of this Court's opinion.⁵⁷

That the principles expressed by this Honorable Court in its last cited opinion comport with the law of the State of Oregon as recently enunciated is clearly evidenced by this statement: "The control by the legislative assembly of all the waters of the state is plenary except that vested rights therein and thereto may not be affected."⁵⁸

Important here is the fact that the Supreme Court of the State of Oregon has specifically held that:

We remember that, as determined by the decree of adjudication, the title to the defendant's land was acquired prior to the passage of the Desert Land Act of March 3, 1877, to which reference has been made. The title of the defendant theretofore carried with it the common-law riparian rights which have always been recognized in this state * * *.

With continuing reference to Oregon's Act of 1909 here under discussion, the court declared: "The law does not profess to or intend to grant to the board

⁵⁶ *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 73 F. 2d 555, 567, 568, 569 (C. A. 9, 1934).

⁵⁷ *Ibid.*, 295 U. S. 142, 153, 165 (1934).

⁵⁸ *Dill et al. v. Killip et al.*, 174 Ore. (94, 147 P. 2d 896, 900 (1944)).

[State administrative agency] of control or to any court the right arbitrarily to take from anyone a riparian right which has its origin prior to the Desert Land Act and give him something else instead thereof. * * *.’’⁵⁹

Evident from a review of the authorities is this fact: The Legislature when it adopted the Water Code in the year 1909 neither intended nor purported to intend to deprive individual owners of vested rights to the use of water. *A fortiori*, as revealed in the phases of this consideration which follow, the enactment in question did not, it is respectfully submitted, could not, deprive the United States of America or the Warm Springs Indian Reservation of the rights to the use of water appurtenant to their respective lands.

The Supreme Court of the State of Oregon has held that the laws of that jurisdiction cannot affect “the right of the United States to water necessary for beneficial use for Government property”; Oregon’s constitution precludes such law

In one of the historical decisions involving rights to the use of water, the Supreme Court of the State of Oregon has enunciated the principle which, it is respectfully submitted, governs under the circumstances which here prevail.⁶⁰ This authoritative statement is there made: “The case of *United States v. Rio Grande Irrigation Company*, 174 U. S. 690, 702

⁵⁹ *Norwood v. Eastern Oregon Land Company*, 112 Ore. 106, 116, 117; 227 Pac. 1111, 1114 (1924). Note: This case cited 73 F. 2d 555, 560.

⁶⁰ *In re Hood River*, 114 Ore. 112, 172; 227 Pac. 1065, 1084 (1924).

* * * is authority for the statement that it is undoubtedly true that a state may change its common-law rule as to every stream within its dominion and permit the appropriation of the flowing water for such purposes as it deems wise." Continuing, Oregon's court declared:

This authority [of the State] is limited in the absence of the consent of Congress, so that the state cannot destroy the right of the United States to water necessary for beneficial use for government property * * *

In precisely the same vein is this statement by Oregon's highest court: " * * * a state may change its common-law rule as to every stream within its dominion, * * *. Nevertheless, declared the court, absent Congressional consent, that

authority is limited, * * * [1] so that the state cannot destroy the right of the United States to water necessary for beneficial use for government property * * *.⁶¹

By those last-quoted excerpts from decisions of Oregon's Supreme Court is reflected the genesis of the law respecting Federal-State relationship over the appropriation of rights to the use of water. Revealed by those quoted statements are the fundamental precepts of the law laid down by the Supreme Court of the jurisdiction in question in perhaps the most important state decision in the field of Western Water law.⁶² They take cognizance of the limitation upon

⁶¹ *Ibid.*, 227 Pac. 1084.

⁶² *Hough v. Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

the police power of the State in regulating the acquisition and administration of rights to the use of water which preclude the destruction of such rights owned by the United States of America and essential to the use of its property—a restriction, let it be emphasized, which is identical with those which necessarily exist with reference to any of the activities of the United States of America when functioning within its sphere of delegated authority. That limitation, let it likewise be emphasized, is inherent in the organic laws pursuant to which the State of Oregon was admitted into the Union. The admission act⁶³ pursuant to which Oregon joined the family of States comprising the Union, contained this condition: “Provided, That the foregoing propositions, hereinbefore offered, are on the condition that the people of Oregon shall provide by an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States * * *.”

With reference to the term “soil” as there used is this statement by the Supreme Court of the State of Oregon respecting the power and authority of the United States to administer the public domain:

This unquestioned power of the owner [the United States of America] over the public domain was exercised, and any one entering upon, and acquiring title to, any part of the public domain after the passage of this act accepted such land and title thereto with full

⁶³ 11 Stat. Chap. 33, Sec. 4, p. 383, 384.

knowledge of the law under which the patent was issued; the import thereof being that *this right incident to the soil* was reserved by the government * * *. [Emphasis supplied.]

Thus the term "soil" with reference to the land of the United States of America within the State of Oregon has been used synonymously with the term "real property and appurtenant rights to the use of water." Consonant with that conclusion is this statement:

* * * in the enabling Acts * * * it is provided * * * that the State will never interfere with the primary disposal of the public lands within its limits. In these provisions the waters flowing within the boundaries of the State must be included as a part and parcel of the public lands.⁶⁴

In connection with the preceding statement it is essential to allude to that phase of the memorandum in which there was reviewed the congressional act establishing the Territory of Oregon. There Congress expressly provided that the rights of the Indians would not be impaired and Congress reserved exclusively to itself the full power to regulate and administer the lands and properties of the Indians. Thus Oregon is without power to adopt legislation which would interfere with the Indians, their land or their rights to the use of water. It is equally manifest that the provision in the Territorial Act prohibiting obstructions in the streams and rivers in which salmon are found was not a limitation upon congressional

⁶⁴ *Hough v. Porter*, 51 Ore. 318, 391; 95 Pac. 732; 98 Pac. 1083, 1092 (1908, 1909). See *Kinney on Irrigation and Water Rights*, 2d ed., vol. 2, sec. 638, page 1118.

authority and could not prevent subsequent enactments authorizing the construction upon lands of the United States dams of the character here involved.

Worthy of reference in that regard are provisions of the enabling acts of Western States admitted to the Union subsequent to the admittance of the State of Oregon. With specificity the Congress has conditioned the entrance into the Union of those States on agreement that they would refrain from interference with the properties of the United States of America and the Indian Tribes. For example, the States of Idaho, Washington, and Montana at the time they assumed statehood, agreed and declared that they would “forever disclaim all right and title to the unappropriated public lands” within their boundaries and to all lands “owned or held by any Indians or Indian tribes * * * and until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, * * *.”⁶⁵

Evident from those provisions of the organic laws of the States last mentioned, they have banned themselves from enacting laws affecting the property of the United States of America and the Indian Tribes. Authority is not required to support the proposition that the States of Washington, Idaho, Montana, and Oregon were admitted into the Union on an equal

⁶⁵ Washington Constitution, Article XXVI, Second; Montana Constitution, Ordinance No. 1, Second; see Constitution of Idaho, Article 21, Sec. 19.

footing. Thus the limitations explicit in their admission to the Union is implicit in regard to the admission act of the State of Oregon. Accordingly, it is respectfully concluded, as the Supreme Court of the State of Oregon has recognized: The State is without power or authority to affect in any way the lands and appurtenances of the United States of America or the Indian Tribes. Necessarily that conclusion includes rights to the use of water.⁶⁶ For as stated by this Honorable Court and revealed above:

Appellees seem to contend that Michel Pablo acquired by prior appropriation the rights in question by local statute or custom, and that the ACT of July 26, 1866, 43 U. S. C. A. § 661, requires recognition of those rights. That statute, however, applies only to "public" lands. * * * Lands which are reserved are severed from the public domain. * * * The statute mentioned, therefore, does not, we think, apply here. **Likewise, the Montana statutes regarding water rights are not applicable, because Congress at no time has made such statutes controlling in the [Indian] reservation. In fact, the Montana enabling act specifically provided that Indian lands, within the limits of the state, "shall remain under the absolute jurisdiction and control of the Congress of the United States."**⁶⁷

To this point the comments contained in the brief of authorities have been devoted to the basic principle that the United States of America is not subject to the police regulations of the State. Emphasized, how-

⁶⁶ *United States v. McIntire*, 101 F. 2d 650, 654 (C. A. 9, 1939).

⁶⁷ See 25 Stat. 676, Sec. 4 (pertaining to both Washington and Montana).

ever, has been the equally basic principle that the State of Oregon in adopting its Water Code in 1909 did not assume title to waters of the State in the proprietary sense of the term. Rather, in accordance with the well established tenets of the law that Code was enacted for regulatory purposes and did not—could not, divest the United States of America of its rights to the use of water. In the paragraphs which succeed there will be reviewed the Congressional enactments pursuant to which the United States of America made available for appropriation rights to the use of water upon the public domain. Let it, however, be emphasized again that the lands here involved are not subject to the Acts of 1866, 1870, and 1877.

Congress by the Desert Land Act ⁶⁸ and antecedent acts ⁶⁹ did not grant to the States the title to the rights to the use of water on the public domain

In detail the character of the police regulations of the State of Oregon relating to the appropriation and administration of rights to the use of water was reviewed in the phase of this brief which immediately precedes. Disclosed by the authorities cited there is the principle that when the State of Oregon declared that, "All waters within the state * * * belong to the public" it was speaking as a sovereign for purposes of regulation, not as a proprietor. Thus, assuming a State could divest the National Government of property, which is denied, it is evident that Oregon by the

⁶⁸ 43 U. S. C. 321.

⁶⁹ 43 U. S. C. 661.

enactment in question had no such intent. As a consequence there is to be considered in this portion of the brief the question of whether the United States of America divested itself of title to the rights to the use of water which gave rise to the subject opinion. There are two phases of that query [1] the statutes in question as they have been construed; [2] their inapplicability to the lands here involved. Each of those facets of the problem will be considered in the order in which they have been set forth.

A. The Desert Land Act and related acts severed the rights to the use of water from land and reserved it for appropriation ⁷⁰

Essential to this element of the consideration is a review of the Act of 1866,⁷¹ the Act of 1870,⁷² and the Act of 1877, the Desert Land Act.⁷³ Especially pertinent is the language used in those acts as it reveals the basis upon which the Supreme Court of the State of Oregon rendered its historical opinion.

By the Act of 1866 the Congress declared that "Whenever, by priority of possession, rights to the use of water * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same * * *." Thereafter in the Act of 1870 Congress provided that "All patents

⁷⁰ *Hough v. Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

⁷¹ 43 U. S. C. 661 (Act of July 26, 1866, C. 262, Sec. 9, 14 Stat. 253.)

⁷² 43 U. S. C. 661 (Act of July 9, 1870, C. 235, Sec. 17, 16 Stat. 218.)

⁷³ Act of March 3, 1877, C. 107, Sec. 1, 19 Stat. 377.

granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, * * * as may have been acquired under or recognized by this section.” Thus said our Supreme Court with reference to the acts last cited, the “right by prior appropriation was recognized by the legislation of Congress in 1866.”⁷⁴

Following the two enactments which accorded Congressional cognizance to the doctrine of prior appropriation so essential to our Western development was the Desert Land Act of 1877. That act having authorized entry upon desert lands of the United States of America, requiring a declaration under oath that the entryman “intends to reclaim a tract of desert land” provided “That the right to the use of water * * * shall depend upon *bona fide* prior appropriation; and such right shall not exceed the amount of water actually appropriated, * * *; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights.”

That quoted language, declares the Supreme Court of the United States “* * * effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself.”⁷⁵ Following the

⁷⁴ *Atchison v. Peterson*, 87 U. S. 507, 510, 513 (1874).

⁷⁵ *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 158 (1934).

enactment of the Desert Land Act, continued the Court:

* * * all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.⁷⁶ Especially pertinent in regard to the last cited decision of the Supreme Court of the United States is that it adopted and paraphrased the opinion of the Supreme Court of the State of Oregon on the subject.⁷⁷ Relative to that Oregon opinion the Supreme Court declared: "The supplemental opinion which deals with the subject beginning at page 382 is well reasoned, and we think reaches the right conclusion."⁷⁸

That "right conclusion" as expressed by the Supreme Court is embraced in this quoted sentence: "The national government by its various laws relating to public lands granted to its citizens the privilege of acquiring title thereto. Construing all together as one act, the desert land act by the language used appears to reserve therefrom to the entire public the right of any citizen after March 3, 1877, to divert, use, and acquire a right in and to the unappropriated waters flowing through, or adjacent to, any lands thereafter patented, such right to be determined by priority. * * *"⁷⁹ Continuing, the Oregon Court declared:

⁷⁶ *Ibid.*, 295 U. S. 142, 162.

⁷⁷ *Hough v. Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

⁷⁸ *California-Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 160, 161.

⁷⁹ *Hough v. Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083, 1091 (1908; 1909).

“* * * This unquestioned power of the owner over the public domain was exercised * * *; the import thereof being that this right [to the use of water] incident to the soil was reserved by the government, to be held in trust for the public, and that he who first applies the water to a beneficial use shall become the owner of the right thereto, * * *.”⁸⁰ Consonant with that declaration the Highest Court stated: “As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * The fair construction of the provision now under review is that Congress intended to establish the rule that for the future the land should be patented separately; and that all nonnavigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.”⁸¹

Thus both the Supreme Court of the United States of America and Oregon’s highest court have declared [1] That unappropriated rights to the use of water on the *public domain* were severed from the land—were made available for appropriation separate and apart from the land; [2] That the waters thus severed were reserved for “the appropriation and use of the public” subject to existing rights.

Especially pertinent in regard to the reservation of rights to the use of water on the public domain

⁸⁰ *Hough v. Porter*, 51 Ore. 318, 391; 95 Pac. 732; 98 Pac. 1083, 1092.

⁸¹ *California-Oregon Power Co., v. Beaver Portland Cement Co.*, 295 U. S. 142, 162 (1934).

for appropriation by the public is this statement by the Supreme Court of Oregon:

* * * the government can deal with its lands as other land proprietors can deal with theirs. In the Pacific Coast states, congress has recognized the privilege of private citizens to acquire usufructuary interest in the waters of public streams, independent of riparian ownership. This is but one way, however, of disposing of the public domain.⁸²

Otherwise stated, the title to the rights to the use of water thus severed was reserved by and resided in the United States of America until a citizen exercised the privilege of appropriating those rights in conformity with the conditions for acquiring them as prescribed by the State. The State of Oregon, like the State of California, recognizes that the source of the title to rights to the use of water which are appropriated on the public domain is the United States of America. Respecting that statement reference is made to the decision of the State of California which fixed for all time the theory of the water law of that State:

* * * and from a very early day the courts of this state have considered the United States government as the owner of such running waters on the public lands of the United States, and of their beds. Recognizing the United States as the owner of the lands and waters, and as therefore authorized to permit the occupation or diversion of the waters as distinct

⁸² *Nevada Ditch Co. v. Bennett*, 30 Ore. 59, 104, 45 Pac. 472, 484 (1896).

from the lands, the state courts have treated the prior appropriator of water on the public lands of the United States as having a better right than a subsequent appropriator, on the theory that the appropriation was allowed or licensed by the United States. It has never been held that the right to appropriate waters on the public lands of the United States was derived directly from the state of California as the owner of innavigable streams and their beds; and, since the act of congress granting or recognizing a property in the waters actually diverted and usefully applied on the public lands of the United States, *such rights have always been claimed to be deraigned by private persons under the act of congress, from the recognition accorded by the act, or from the acquiescence of the general government in previous appropriations made with its presumed sanction and approval.*⁸³ [Emphasis supplied.]

From the same source as the statement last quoted is taken this pertinent excerpt: "The government of the United States has the absolute and perfect title to its lands." Also this statement: "* * * the grantee or patentee acquires from the United States—the absolute and unqualified owner of the public lands—common-law rights in the waters flowing through the land granted (except where the waters, or a portion of them, are reserved) has never been disputed."⁸⁴

⁸³ *Lux v. Haggin*, 69 Cal. 255, 338; 10 Pac. 674, 721 (1886).

⁸⁴ *Lux v. Haggin*, 69 Cal. 255, 338; 10 Pac. 674, 722 (1886).

In a comprehensive review of the authorities there is clearly reflected the principle enunciated above to the effect that the United States of America severed the waters from the public domain and accorded to the public the privilege of appropriation of those waters.

There is complete consistency in the principles of law which have been reviewed. Each of the sovereigns, the United States of America and the State of Oregon, has within the sphere of its respective authority, taken steps to insure the highest and best use of the limited supply of water available on the public lands of the arid West—the National Government has reserved those waters for appropriation; the State through its police regulations has provided the *modus operandi*, in the words of the Supreme Court of the State of Idaho, pursuant to which the State has acted to guarantee “that the common rights of all shall be equally protected and that no one shall be denied his proper use and benefit of this common necessity.”⁸⁵ Each sovereign within its sphere of authority has acted; neither sovereign is, however, subject to the control of the other.

In the words of the Supreme Court of the United States:

As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. * * * Congress intended to establish the rule [by the Acts of 1866, 1870,

⁸⁵ *Walbridge v. Robinson*, 22 Idaho 236, 125 Pac. 812, 814 (1912).

1877] that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named.⁸⁶

Continuing, the Supreme Court stated: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, * * *."⁸⁷ Undeniably the State in its police power had full control over rights to the use of water on the *public domain* as between the *individual* claimants before it. That plenary power of the State exercised in the form of the comprehensive police regulations for the administration of rights to the use of water did not—it is respectfully submitted, could not—nor does it purport to, include the United States of America. Equally clear, as revealed above, is the fact that Oregon could not affect the interests of the United States in the waters severed from the public domain and reserved for appropriation. In the words of the Supreme Court: "State laws cannot affect titles vested in the United States."⁸⁸

⁸⁶ *California-Oregon Power Co., v. Beaver Portland Cement Co.*, 295 U. S. 142, 162 (1934).

⁸⁷ *California-Oregon Power Co., v. Beaver Portland Cement Co.*, 295 U. S. 142, 163, 164 (1934).

⁸⁸ *United States. v. Utah*, 283 U. S. 64, 75 (1930) See review of authorities declaring that State police regulations cannot control the United States of America.

B. The United States of America by withdrawal of property from the public domain excepts the rights to the use of water which are involved from the police regulations of the State

The principles governing this phase of the consideration have been enunciated by the Supreme Court of the State of Oregon.⁸⁹ There that court commented at length regarding the power of the United States of America over rights to the use of water on the public domain. "Now, if such an estate [an appropriative right] may be carved out of the public domain for an individual, it may be reserved by the general government; * * * which may lay hold of and use them, without taking any of the steps made necessary to obtain a usufructuary interest therein by private individuals."⁹⁰ By that succinct statement Oregon's highest court in substance declared that the United States of America was empowered to utilize the waters of the public domain without regard to the police regulations which govern the appropriation of rights to the use of water by individuals. That decision is entirely consonant with the proposition that by the Desert Land Act of 1877 and the related antecedent acts there was constituted a reservation in the United States of America of the waters on the public domain.

In accord with the principles recognized by the Supreme Court of the State of Oregon, Montana's highest court has declared:

⁸⁹ *Nevada Ditch Company v. Bennett*, 30 Ore. 59, 104; 45 Pac. 472, 484 (1896).

⁹⁰ *Nevada Ditch Company v. Bennett*, 30 Ore. 59, 104; 45 Pac. 472, 484 (1896).

A water right can therefore be acquired only by the grant, express or implied, of the owner of the land and water. The right acquired by appropriation and user of the water on the public domain is founded in grant from the United States Government as owner of the land and water. Such grant has been made by Congress.⁹¹

Following the principle set forth in the last-quoted excerpt the Supreme Court of the State of Montana reaffirmed its earlier pronouncement.⁹² So relevant are the facts that they will be reviewed: There the United States of America utilized water from Bear Creek on the Ft. Ellis Military Reservation. From that source ditches were constructed to divert 200 miner's inches of water. By a specific act of Congress adopted in 1891, the lands comprising the then abandoned Ft. Ellis Reservation were made available to the State of Montana, which was permitted to select that property upon which the waters there involved had been used. In the words of the Court: "It is contended by the Attorney General [of Montana] that Congress granted to the state the ditch from Bear Creek, together with the right to use 200 inches of the waters of said creek." Denying Montana's contention on the grounds that the grant of the land did not carry with it the rights to the use of water, the Court made this pertinent statement:

Prior to the time of settlement upon the lands in question, and prior to the appropriation of

⁹¹ *Smith v. Denniff*, 24 Mont. 20, 21; 60 Pac. 398 (1900).

⁹² *Story, et al., v. Woolverton, et al.*, 31 Mont. 346, 353, 354; 78 Pac. 589, 590 (1904).

the waters of Bear creek by any one, both the land and the water were the property of the government. When the government established the reservation, it owned both the land included therein, and all the water running in the various near-by streams to which it had not yielded title. It was therefore unnecessary for the government to "appropriate" the water. It owned it already. All it had to do was to take it and use it. When the government abandoned the military reservation, it also must have abandoned the use of the water thereon, which was again allowed to flow in its regular channel as a part of the public domain, subject to the appropriation of any one who sought to take it.

Reference in regard to that quoted excerpt is made to the Constitution of the State of Montana, asserting that the use of water within the jurisdiction in question is a public use.⁹³

Decisions of the Supreme Courts of the States within the Ninth Circuit have reiterated and reaffirmed the doctrine that the United States of America by the Acts of 1866, 1870 and 1877 did not relinquish title to the unappropriated waters on the public domain. It is the principle adhered to by the State of California.⁹⁴

A frequently cited case rendered by the Supreme Court of the State of Idaho adopted the concept that the United States of America is the source of the title

⁹³ Constitution of Montana, Article III, Sec. 15.

⁹⁴ *Lux v. Haggin*, 69 Cal. 255, 10 Pac. 674 (1886); *Wood v. Etiwanda Water Co.*, 122 Cal. 152; 54 Pac. 726 (1898); *The San Joaquin & Kings River Canal & Irrigation Co. v. Worswick*, 187 Cal. 674, 203 Pac. 999 (1922).

to rights to the use of water.⁹⁵ Very early in the history of western water law the Supreme Court of the State of Washington declared, it is respectfully submitted, the principle which here governs: "It was apparent to congress, and, indeed, to every one, that neither local customs nor state laws or decisions of state courts could vest the title to public land or water in private individuals without the sanction of the owner, viz, the United States. The government, being the sole proprietor, had the right to permit the water to be taken and diverted from its riparian lands; * * *." ⁹⁶

Emphasizing its earlier—and above-quoted—declaration on the proposition, Washington's highest court decided: "* * * up to that time [of patent] the title to the land, with all its incidents, is vested in the United States, utterly beyond the power or control of state Legislatures, and the party thereafter acquiring title from the government acquires the land with all its incidents." ⁹⁷

This authoritative summary is reflective of the decisions which have to this point been reviewed:

The Government is still the owner of the surplus of the waters flowing upon the public domain, or rather the owner of all the waters flowing thereon remaining after deducting the rights to the use of the same which have vested in and accrued in some legal way to individuals and companies. * * * It therefore follows, as the result of the ownership by the United States

⁹⁵ *Le Quime et al. v. Chambers*, 15 Idaho 405; 98 Pac. 415 (1908).

⁹⁶ *Benton v. Johncox*, 17 Wash. 277, 289; 49 Pac. 495, 499 (1897).

⁹⁷ *Kendall v. Joyce*, 48 Wash. 489; 93 Pac. 1091, 1093 (1908).

of the waters flowing upon the public domain, that any dedication by a State of all the waters flowing within its boundaries to the State or to the public amounts to but little, in the face of any claim which may be made by the Government, *at least* to all the surplus or unused waters within such State.⁹⁸

This Honorable Court has uniformly recognized the principle that the United States of America has the power to reserve the public lands and the water on those lands for the Nation's welfare.⁹⁹ "The policy of reclaiming the arid region of the West for a beneficial use open to all the people of the United States is as much a national policy as the preservation of rivers and harbors for the benefit of navigation. * * *

"That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular, beneficial purpose, was held by this court in *Winters v. United States*, * * *.

"To the same effect was the decision of this court in *Conrad Inv. Co. v. United States*, * * *."

From the *Winters* opinion of this Honorable Court, cited in the quoted excerpt, this statement is taken:

And it is * * * well settled that, when the lands of the government have been legally appropriated or reserved for any purpose, they become severed from the public lands, and that no subsequent law or sale should be construed to embrace or operated upon them. * * *

⁹⁸ Kinney on Irrigation and Water Rights, Vol. 1, 2d ed., Sec. 411, pp. 692, 693.

⁹⁹ *Burley v. United States*, 179 Fed. 1, 11, 12 (C. A. 9, 1910).

In conclusion, we are of opinion that the court below did not err in holding that, "when the Indians made the treaty granting rights to the United States, they reserved the right to use the waters of Milk river, at least to an extent reasonably necessary to irrigate their lands. The right so reserved continues to exist against the United States and its grantees, as well as against the state and its grantees."¹⁰⁰

Continuing to recognize the power of the United States of America to sever from the public domain and utilize unappropriated waters bounding or traversing those lands, this Court declared: "* * * the policy of the government to reserve whatever water of Birch creek may be reasonably necessary, not only for present uses, but for future requirements, is clearly within the terms of the treaties as construed by the Supreme Court in the *Winters* case."¹⁰¹

At this point it is essential to allude to a decision of this Court which it cites in the subject opinion.¹⁰² There this Court declared that the United States of America may "not interfere with state legislation over waters of the state." That statement is, of course, fundamental. Manifestly, the United States of America is not empowered to foist upon the State the kind and character of rights which may be recognized within a particular jurisdiction; whether riparian rights will be protected or abrogated; when a commission or a State officer will administer. Yet,

¹⁰⁰ *Winters v. United States*, 143 Fed. 740, 748, 749 (C. A. 9, 1906); affirmed 207 U. S. 564 (1908).

¹⁰¹ *Conrad Inv. Co. v. United States*, 161 Fed. 829, 832 (1908).

¹⁰² *United States v. Hanson*, 167 Fed. 881, 884 (C. A. 9, 1909).

it is respectfully submitted, the principle there propounded does not prevent the United States of America from exercising unappropriated rights to the use of water to fulfill its own needs. Such an exercise must necessarily take cognizance of vested rights, and is limited to the use of water which the Central Government may need.

In thus declaring the sphere in which the State police regulations are operative, this Honorable Court was stating in different terms the principle recognized by the Supreme Court when it ruled, as between individual claimants, that "all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states, * * *." ¹⁰³ That "plenary control" does not and, as emphasized above, could not embrace the National Government. For, as the Supreme Court of the State of Oregon has repeatedly held: "the state cannot destroy the right of the United States to water necessary for beneficial use for government property * * *." ¹⁰⁴ Neither may the States preclude the utilization of the unappropriated rights to the use of water on the public domain. That conclusion, as revealed above, was reiterated and reemphasized by this Honorable Court when it recently declared: "It is of course well settled that private rights in the waters of non-

¹⁰³ *California-Oregon Power Co., v. Beaver Portland Cement Co.*, 295 U. S. 142, 163, 164 (1934).

¹⁰⁴ *In re Hood River*, 114, Ore. 112, 172, 227 Pac. 1065, 1084 (1924); *Hough v. Porter*, 51 Ore. 318; 95 Pac. 732; 98 Pac. 1083 (1908; 1909).

navigable streams on the public domain are measured by local customs, laws and judicial decisions. * * *

But it does not follow that the Government may not, independently of the formalities of an actual appropriation, reserve the waters of non-navigable streams on the public domain if needed for governmental purposes.¹⁰⁵

There is no conflict between the principles thus propounded that the United States may withdraw the waters made available for appropriation prior to the actual exercise of the right by an appropriator, and the theory that the Acts of 1866, 1870 and 1877 constituted a dedication of the waters on the public domain to the public. It is a basic proposition of law that: "Prior to acceptance, dedication is an offer continuing until revoked. The offer may be withdrawn or revoked at any time before acceptance, either actual or implied."¹⁰⁶ That tenet of the law has been stated in these terms: "In general, the proprietor may revoke or withdraw his offer of dedication, in whole or in part, at any time before it is accepted by the public or its representative and before the rights of private persons have intervened."¹⁰⁷ Thus, in complete accord with the accepted principles of real property law, to the extent that the waters on the public domain have not been appropriated, they may be withdrawn from appropriation. That statement comports fully with the numerous decisions

¹⁰⁵ *United States v. Walker River Irr. Dist.*, 104 F. 2d 334, 336, 337 (C. A. 9, 1939).

¹⁰⁶ Thompson on Real Property, Vol. 2, Sec. 488, p. 58.

¹⁰⁷ 16 Am. Jur., Dedication, Sec. 29, p. 375.

of this Honorable Court. It is sustained by the declaration of the Highest Court that:

The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.¹⁰⁸

Congress has reserved rights to the use of water. Respecting the National Forests severed from the public domain this authoritative statement has been made: "The last clause of the Act of Congress quoted above, 'or under the laws of the United States and the rules and regulations established thereunder,' reserves in the United States rights to the use of waters flowing over forest reserves or National Forests."¹⁰⁹ Similarly, Congress has provided for the withdrawal of "Lands containing water holes or other bodies of water needed or used for watering purposes * * *."¹¹⁰ President Calvin Coolidge, exercising the powers thus conferred "ordered that every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole * * * be, and the same is hereby, withdrawn * * * and reserved for public use * * *."¹¹¹

These are but examples of the powers exercised by Congress over the water on the public domain subsequent to the passage of the Desert Land Act and acts antecedent to it. That exercise of power is in full

¹⁰⁸ *Winters v. United States*, 207 U. S. 564, 577 (1908).

¹⁰⁹ Kinney on Irrigation and Water Rights, 2d ed., vol. 2, sec. 669, 16 U. S. C. 481.

¹¹⁰ 43 U. S. C. 300.

¹¹¹ Executive order dated April 17, 1926.

conformity with the repeated declarations by this Honorable Court and the Supreme Court, that “The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.”

This case does not involve any conflict over rights to the use of water—there is involved only a nonconsumptive use of water upon lands title to which has never passed from the United States of America or from the Indians and which are subject to the complete control of Congress

The case concerning which the subject opinion was written did not involve a conflict over rights to the use of water. Sole question there presented is whether the police regulations of the State of Oregon controlled the United States of America in regard to its own lands which were not part of the public domain.

Judge Healy’s dissent points out this salient feature of the matter: “* * * as the Federal Power Commission’s order respecting the installation of a re-regulating dam [located off of reservations of the United States] apparently conforms in every way to the State’s requirements, there would appear to be no case or controversy here with respect to this portion of its order. * * *

Hence the controversy concerns only the matters already discussed, namely the right of the United States to license the construction of the high dam and the power plant [situated entirely upon lands of the United States of America and the Indians withdrawn many years ago as power sites].”¹¹²

¹¹² Opinion, page 15.

It is to be observed, moreover, that the issues in other cases involving navigable streams situated east of the One Hundredth Meridian have no application in the subject proceeding.¹¹³ Clearly the Acts of 1866, 1870, and 1877 have no application to the properties involved in the case last cited. Here it is asserted that the United States of America reserved the rights to the use of water which the licensee seeks to exercise and that the police regulations of the State of Oregon have no application. In addition it is to be emphasized that for reasons expressed above, the State of Oregon could not by its own legislation in any manner affect the title and interests of the United States to the rights to the use of water thus reserved. For as most recently declared by the Highest Court: "The power of Congress to dispose of any kind of property belonging to the United States 'is vested in Congress without limitation.' " ¹¹⁴ As Congress has authorized the Federal Power Commission to proceed in the manner discussed in the subject opinion, as the lands in question are not part of the public domain, it is respectfully submitted that the issuance of the license in question was fully within the authorization of the Federal Power Commission.

¹¹³ *Niagara Mohawk Power Corp. v. Federal Power Commission*, C. A. D. C., 1952, 202 F. 2d 190, 207; affirmed March 15, 1954, Supreme Court of the United States, No. 28 October Term 1953.

¹¹⁴ *Opinion State of Alabama, Complainant v. State of Texas; State of Rhode Island et al. v. State of Louisiana*, Per curiam, October Term, 1953, dated March 15, 1954.

CONCLUSION

In conclusion your Petitioners respectfully pray that in the light of the circumstances and the great and fundamental issues involved the United States of America be allowed a rehearing before the full bench.

Respectfully,

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CERTIFICATE OF COUNSEL

I certify that the foregoing petition for rehearing en banc is, in my judgment, well founded and that it is not filed for the purposes of delay.

J. LEE RANKIN,
Assistant Attorney General.

